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Individual and Institutional Responsibility: A Vision for Comparative Fault in Products Liability

Mary J. Davis

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INDIVIDUAL AND INSTITUTIONAL RESPONSIBILITY: A VISION FOR COMPARATIVE FAULT IN PRODUCTS LIABILITY

MARY J. DAVIS*

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* Assistant Professor, University of Kentucky College of Law; B.A., 1979, University of Virginia; J.D., 1985, Wake Forest University School of Law. This article was aided by the insightful comments of my colleagues, Richard C. Ausness and Michael P. Healy. Thanks to Linda S. Tally, Class of 1994, for her valuable research assistance on this article and over the last three years.

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I. INTRODUCTION

Since the adoption of strict products liability over the last thirty years,¹ two problems of scope have received the most attention: how to define product defectiveness to which the liability attaches,²

1. RESTATEMENT (SECOND) OF TORTS § 402A (1965). The Restatement (Second) of Torts, promulgated by the American Law Institute, is the primary vehicle by which jurisdictions recognize strict products liability. Its impact on tort liability has been extensively chronicled. For general discussions of the effect of section 402A on products liability in the last three decades, see generally, 1-2 AMERICAN LAW INSTITUTE, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, REPORTERS' STUDY (1991) [hereinafter ALI REPORTERS' STUDY] (attempting to chronicle history of products liability and coming to grips with more difficult issues leading to alleged tort crisis of previous decade).

2. Imposing strict liability has been easiest in the case of products with manufacturing defects, when the product has an unintended flaw that resulted from the natural imperfection of the manufacturing process. Most commentators recognize that strict products liability was propelled as a result of such products and the consequent difficulty in proving negligence in the manufacturing process. See, e.g., *Escola v. Coca-Cola Bottling Co. of Fresno*, 150 P.2d 436, 439 (Cal. 1944) (holding that difficulty of proving negligence leads to expanded use of *res ipsa loquitur* in proving defect in manufacturer's product). The effort to include products with design and warning defects has proved most troublesome because these defects necessarily require an evaluation of the manufacturer's conduct in choosing product design and consumer warnings. This appears to be a peculiarly negligence-based inquiry. Many commentators have suggested that the effort to include design defects within the scope of strict liability is fraught with problems. Among these are the inability of judging how a product should be designed and the inherent inability of courts to define standards of product design. See generally Mary J. Davis, *Design Defect Liability: In Search of a Standard of Responsibility*, 39 WAYNE L. REV. 1217, 1217-18 (1993) (advocating focus on conduct in design defect cases with

and how to limit the potentially limitless liability through defenses.³ Much like the industries of the nineteenth century, product liability defendants of the twentieth century turned to the plaintiff's conduct as a main line of defense.⁴ Blaming the victim has historically been a powerful tool for tort defendants to evade responsibility for their conduct.⁵ This Article proposes that the defenses based on

high standard of care for manufacturers) and cases and articles cited therein. Regarding the difficulty of applying a strict liability standard in warning defect cases, see generally James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265 (1990) (advocating negligence standard in failure-to-warn cases to mitigate confusion stemming from present strict liability standard).

3. Even in the early 1970s, tort reformers were busy stemming the feared tide of unlimited liability. A number of avenues of liability limitation have been explored. For example, statutes of repose to cut off liability based on the age of the product were enacted in many jurisdictions, apparently because of the perceived unfairness of attaching strict liability to a product made many years earlier. Defenses based on a product's compliance with governmental or administrative regulations have been proposed for decades. Suggestions of caps on exemplary and general damages have surfaced as well, beginning in the medical malpractice area and spreading to the products liability area. For a discussion of the need for these and other proposed reforms, see PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 9-10 (1988) (espousing reduction in litigation to lessen costs of compensating tort victims); W. KIP VISCUSI, *REFORMING PRODUCTS LIABILITY* 1-13 (1991) (advocating use of risk-utility analysis in products liability); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1523-26 (1987) (citing need to reform products liability law to revitalize insurance law); Joseph Sanders & Craig Joyce, "Off to the Races": *The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 213 (1990) (displaying necessity for states to reform tort liability to reduce skyrocketing insurance premiums).

4. See, e.g., *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 899 (Cal. 1963). In *Greenman*, one of the first cases to recognize strict products liability, the defendant manufacturer tried bitterly to convince the court that the plaintiff's misuse of the product caused the injury, not the condition of the product. *Id.*

5. *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809). The rallying cry of "contributory negligence" has been heard from defendants since 1809 when *Butterfield* was decided. *Butterfield* involved a plaintiff who rode his horse at high speed into a pole the defendant had left in the road. Lord Ellenborough, speaking for the court, declared:

A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do [sic] not himself use common and ordinary caution to be in the right. One person being in fault will not dispense with another's using ordinary care for himself.

Id. at 927.

Several reasons have been articulated for the quick acceptance of the *Butterfield* doctrine by the courts of the early 19th century. Primarily, the courts of the era sought to protect fledgling industry in the early days of the Industrial Revolution. Additionally, the early common law courts did not feel they could find more than one proximate cause of an injury, further complicating their inability to apportion damages. For a complete discussion of the foundation of the doctrine, see Fleming S. James, Jr., *Contributory Negligence*, 62 YALE L.J. 691 (1953); Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946).

For a discussion of the ways in which the common law tort system encourages rather than discourages the power imbalances between victims and corporate

victim fault that have evolved in our products liability system do not adequately balance the responsibilities of the institutional⁶ and individual actors who are part of the product relationship.

When strict products liability came onto the liability scene in the early 1960s, most jurisdictions still employed contributory negligence as a complete bar to a plaintiff's recovery in a negligence action.⁷ Consequently, although one of the primary goals of strict products liability was risk-distribution to the party most capable of anticipating and thus bearing it,⁸ most defendants continued to ar-

tortfeasors, see Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power and Responsibilities*, 1990 DUKE L.J. 848, 850-63.

6. Because product liability defendants, whether manufacturers, suppliers, distributors or retailers, are business organizations, and rarely individuals, it is appropriate to identify these entities as "institutional" for ease of reference. "Institution" is defined as "an established organization or corporation." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 627 (1985). An institution's decisions are, more often than not, made collectively, through a process of discussion and deliberation. Many persons within an institution will have a say in decisions made and courses of action taken. While institutions are certainly as diverse as individuals, all institutions share the characteristic of joint effort simply by virtue of there being more than one person involved in any endeavor. Therefore, while it is probable, if not likely, that many product liability institutions are akin to mini-dictatorships, with many subordinates attempting to do the bidding of the chief, they still bear the characteristic of joint effort by all those associated with it, if not joint decision-making.

For an insightful discussion of the need to reevaluate the responsibility of corporate/institutional decision-makers in the context of mass tort actions, see Bender, *supra* note 5, at 851-63. Professor Bender eloquently argues that our legal system has not held corporate decisionmakers legally responsible for the harms committed by the corporations that they lead. *Id.* at 861, 868-69.

7. While jurisdictions were considering a move to strict products liability during the 1960s and 1970s, commentators and courts were also seriously reevaluating the fairness of contributory negligence as a complete bar to plaintiff's recovery. Generally, contributory negligence was not a bar to recovery in strict liability actions based on abnormally dangerous activities or injury from animals. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 79, at 565 (5th ed. 1984) [hereinafter PROSSER & KEETON ON TORTS]. The ALI Reporters working on section 402A followed the general rule that contributory negligence does not bar recovery in strict liability actions. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965) (stating that defense is not applicable when negligence consists merely of failure to discover defect). The ALI Reporters recognized the incongruity between imposing strict non-fault based liability and allowing plaintiff's fault to bar recovery. They concluded that contributory negligence constituting a voluntary and unreasonable assumption of the risk would act as a total bar to recovery. *Id.* For a complete discussion of the history of contributory negligence as a defense to a strict products liability action, see *infra* notes 35-43 and accompanying text. Additionally, several commentators have chronicled the history of contributory negligence and its perceived harshness. See generally, James, *supra* note 5; Malone, *supra* note 5.

8. For a discussion of the goals of strict products liability, see 1 ALI REPORTERS' STUDY, at 23-33; Davis, *supra* note 2, at 1226-30. For a general discussion of the risk distributive focus of much of tort law, see George P. Fletcher, *Fairness and Utility in Tort Law*, 85 HARV. L. REV. 537, 543-56 (1972) (exploring theory of recip-

gue that plaintiff's conduct should be considered in determining the extent of a defendant's liability.⁹ A failure of plaintiff's responsibility, it was argued, should lead to the reduction or bar of any recovery. That the defendant produced a dangerously defective product, capable of harming thousands of persons, negligent or

rocal risks as foundation of tort law) and George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 461-65 (1985) (chronicling development of theory of risk distribution as foundation of modern tort law).

The most persuasive statement of the risk distributive focus behind strict products liability is found in *Escola v. Coca-Cola Bottling Co. of Fresno*, 150 P.2d 436 (Cal. 1944). In his concurring opinion, Justice Traynor observed that, "Public policy demands that the responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." *Id.* at 440-41 (Traynor, J., concurring).

Risk distribution is only one, but perhaps the predominant, basis of strict products liability. Much has been written on the representational and fairness aspects of strict products liability. See Thomas A. Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077, 1093 (1965) (identifying policies that operate in products liability as closing or refusing to close gap between old and new form of law, yielding to consumer preference, preventing unilateral shift of risk from producer to consumer, and recognizing reaction of producers to newer liberalized discovery rules); David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 703-14 (1980) [hereinafter Owen, *Rethinking the Policies*] (demonstrating need to determine social goals of products liability and to chart course for its future); David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 459-500 (1993) [hereinafter Owen, *Moral Foundations*] (commenting on moralistic concerns of strict liability relating to freedom and community responsibility); Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1131-52 (1974) (analyzing legal struggles giving rise to doctrines of consumer protection and products liability).

9. Common sense dictates this statement. In my experience as a products liability defense attorney for six years, I never failed to raise this argument—or to be instructed to find a way to raise it by my clients—and I do not know any defense lawyer who has. Now, of course, where a defendant acknowledges his or her liability for a manufacturing defect under strict liability and the plaintiff's injury resulted from the defect, it is possible that a defendant might not raise plaintiff conduct as a defense. Even in those circumstances, we are tempted to implicate plaintiff's conduct, if only as a settlement tool. Moreover, even in the face of an objectively clear case, assuming such a thing exists, few manufacturers would admit liability anyway.

Evaluating the character of plaintiff fault came first in the switch to comparative negligence that most jurisdictions accomplished in the 1970s. For a discussion of this move and the reasons for it, see *infra* notes 28-34 and accompanying text. For a discussion of comparative fault, see generally VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* (2d ed. 1986). The courts had to grapple with how to compare plaintiff's negligence to the presumptively non-fault based system of strict products liability. The problem was how to compare the fault and non-fault systems, given the policy reasons behind strict products liability, and the attempt to make plaintiff's *prima facie* case, and hence, recovery easier. For a discussion of these systems, see *infra* notes 38-43 and accompanying text.

not, is noticeably absent from such arguments about responsibility for the incident.¹⁰

In defense of their position, defendants frequently point to the moral hazard presented if victim fault is not considered— i.e. product users will become dangerous and lazy in their product use if the system compensates them in spite of their conduct.¹¹ The argument is that the insurance function of such a system creates a disincentive to safety by the product user.¹² Even assuming such a moral hazard exists, which is doubtful, the deceptive simplicity of limiting liability by pointing the finger at an ill-advised move on the plaintiff's part obscures the potential for injury. It also obscures the institutional defendant's failed responsibility to the relationship of trust between the institutional defendant and the consuming public.¹³

10. The basis of any defense based on victim fault is that the defendant, being negligent or otherwise liable, should not have to compensate this plaintiff because of plaintiff's conduct, *not* that the defendant escapes culpability. Victim fault is an avoidance of liability, and thus a denial of responsibility. Most product defendants also fight the battle of product defect and argue both that the product is not defective and that, even if it is, the plaintiff's conduct bars recovery. Consequently, the primary defense strategy is to shift the focus away from the danger in the product to the danger of the plaintiff's conduct.

One of the primary driving forces behind the imposition of strict liability was the belief that it would encourage safer, better quality products. *See* *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900-01 (Cal. 1963) (holding manufacturer strictly liable for article placed on market with defect that injures); *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 440-44 (Cal. 1944) (Traynor, J., concurring) (explaining that public policy of strict products liability will protect public); *see also* Davis, *supra* note 2, at 1226-30 (summarizing policy reasons behind strict products liability); James A. Henderson, Jr., *Coping with the Time Dimension in Products Liability*, 69 CAL. L. REV. 919, 931-39 (1981) (outlining the policy reasons behind the imposition of strict products liability). In the last 25 years, product manufacturers have undoubtedly made safer products.

11. This dilemma, the moral hazard of insurance, is often used by critics of the liability system as an argument that contributory negligence should be either a complete defense in all circumstances or, at least, should be a complete defense in the case of product misuse and assumption of the risk. Product users will be encouraged to take less care, it is argued, if they know that someone else will cover their losses. *See generally* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 165-66 (4th ed. 1992) (discussing effect of insurance and liability rules on level of care exercised and advocating economic analysis of such rules).

12. For a discussion of the many reasons behind plaintiff conduct, *see infra* note 236 and accompanying text.

13. Owen, *Moral Foundations*, *supra* note 8, at 459-60. This masterful work attempts to delineate the moral foundations of products liability to begin to answer this question. Professor Owen describes the values of freedom and community, which form the basis of the moral foundation of responsibility in products liability actions. *Id.* at 436. Further, Professor Owen relies on the special nature of the relationship between the product manufacturer and consumer/user that underlies the moral theory that he describes. *Id.* at 436, 463, 473.

Professor Owen does not, however, focus enough attention on the trust na-

The idea that victim fault is an appropriate element in determining the extent of liability has existed for a long time. To illustrate the American treatment of victim fault, this Article takes a comparative approach to this contentious issue by exploring the development of victim fault in European law, from the time of the *Corpus Juris Civilis* of Emperor Justinian to the recent approach taken by the European Community (EC).¹⁴ The reliance on victim fault to prevent unlimited liability has gone virtually unchallenged in this country. This phenomenon is based, in part, on our society's unflinching dedication to individualism and self-reliance.¹⁵

ture of the relationship that inheres in the manufacturer's supreme knowledge and the consumer/user's inability to obtain that knowledge. *Id.* at 476-77 & n.203. In an earlier article, I have taken the position that the special trust relationship requires more of the manufacturer than merely reasonable—what Professor Owen describes as optimal—care in the design of products. *Id.* at 476. See Davis, *supra* note 2. This Article continues in that same vein, elaborating on the effects of the special nature of the manufacturer/consumer relationship, by describing the most effective means of evaluating plaintiff conduct so as to promote respect for the responsibilities of the members of that relationship. For further discussion of this issue, see *infra* notes 245-60 and accompanying text.

Professor Owen also catalogues the literature in this area on the philosophical foundation of tort law that attempts to explain the corrective justice theory of that foundation. Owen, *Moral Foundations*, *supra* note 8, at 434-36 (referencing cites within article). The work of academics like Ernest Weinrib and Jules Coleman, who have written most about corrective justice, is rich and intellectually demanding. See, e.g., JULES L. COLEMAN, RISKS AND WRONGS 435-39 (1992) (relating corrective justice to liberalism, contract law and marketing); Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427, 428-41 (1992) (distinguishing between annulment, relational and mixed conception views of corrective justice); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 409-11 (1992) (demonstrating corrective justice as structure underlying relationship between two parties to lawsuit); Ernest J. Weinrib, *The Special Morality of Negligence Law*, 2 LAW & PHIL. 37 (1983) (applying corrective justice to negligence law as way of restoring parties to equality). These articles represent a small percentage of the vast amount of literature in the area of corrective justice. A recent symposium on corrective justice will provide ample references. See *Symposium: Corrective Justice and Formalism: The Care One Owes One's Neighbors*, 77 IOWA L. REV. 403 (1992). A particularly helpful piece in this symposium issue is an article by Richard Wright, which summarizes the writings of both Coleman and Weinrib and attempts to add substantive meaning to otherwise arid principles. Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 702-11 (1992) (demonstrating that corrective justice is still feasible).

14. For a discussion of the European Civil Codes' approach to victim fault, see *infra* notes 152-74 and accompanying text.

15. For a discussion of individual freedom as the basic moral imperative in products liability, see *infra* notes 250-53 and accompanying text. It is by no means self-evident that victim fault should have any bearing on another's tort liability. The traditional "all-or-nothing" approach to many tort rules, like causation, suggests as much. Since I began teaching Torts, however, I have been amazed by the unrelenting determination of students to inject plaintiff fault into virtually every case we cover in the course. Perhaps it is because they are philosophically conservative, and therefore generally unsympathetic. The students seem very comfortable making judgments about an individual plaintiff's responsibility for his own

Unfortunately, this ideal of freedom and individualism, equally strong in the European Civil Codes, fosters an inconsistent treatment of responsibilities in American society. This Article criticizes the approach to victim fault used in most American jurisdictions.¹⁶ The majority approach minimizes institutional responsibility by ignoring the importance of the status of the persons to whom the responsibility is owed, and the effect of a failure of responsibility on that relationship.¹⁷ The Article proposes evaluating the failure of both individual and institutional responsibility in light of the relationships to which they belong.

Part I of this Article considers the history of the treatment of victim fault in this country and explores its theoretical underpinnings. Part II explores the predominant American methods of evaluating victim conduct in products liability. These methods appear

injuries and the inappropriateness of complaining about such an injury, even by a negligent defendant. The students are very unwilling, however, to criticize decisions made by institutional defendants and are much less likely to be judgmental about those decisions. They are reluctant from the outset to define standards governing conduct, especially once they recognize that those standards govern institutional actors as well as individuals. Perhaps it is intuitively easier to criticize an individual's conduct than to criticize the conduct of institutions whom the students, and probably the rest of us, naively presume will act fairly and wisely.

16. For a discussion of the general treatment of victim fault in the United States, see *infra* notes 35-43 and accompanying text.

17. The timeliness of this critique and proposal for change is evidenced by the American Law Institute's (ALI) recent effort to draft a new section on products liability for a proposed Restatement (Third) of Torts. See Product Safety and Liability, 60 U.S.L.W. 2764 (June 9, 1992). Professors James A. Henderson, Jr. and Aaron D. Twerski were named as co-reporters for the Products Liability section of the planned Restatement. One of their key responsibilities will be "to steer a divergent group of scholars and practitioners toward completion of the influential study, which is expected to take about five years to complete." *Id.*; see also *Already on the Record*, LEGAL TIMES, June 8, 1992, at 3 (describing philosophical bent of Professors Henderson and Twerski to project). Professors Henderson and Twerski have already re-written section 402A on strict products liability in a recent article. See James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512 (1992).

The ALI chose to commission a revised Restatement on the heels of a five-year study of the efficiency and fairness of the current system of imposing liability for product-related injuries. See ALI REPORTERS' STUDY, *supra* note 1. The Chief Reporter for the ALI Reporters' Study, Professor Paul C. Weiler, of Harvard University School of Law, explained that the Study concluded that the insurance crisis is "more directly related to capital problems on the insurance side of the tort regime, not to an explosion of spurious claims." ALI Tests Waters of Tort Reform, 59 U.S.L.W. 2707 (May 28, 1991). However, the study also indicated that there was an increase in liability imposition on the "wrong defendants" and inadequate compensation for real victims." *Id.*

A Tentative Draft was recently submitted to the ALI and discussed. See AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY, TENTATIVE DRAFT No. 1 (Apr. 12, 1994). For a discussion of the Tentative Draft's provisions on victim fault, see *infra* notes 237-42 and accompanying text.

almost juvenile in their efforts to point the finger at the victim, who is the most defenseless. Part II focuses on four jurisdictions, Illinois, Colorado, Ohio and Texas, that illustrate the four major comparative fault methods employed in this country. These jurisdictions illustrate another phenomenon—each has experienced changes in its comparative fault rules under the guise of tort reform in the last five years which have expanded the availability of victim fault as a defense. Such changes show the regressive effects of recent tort reform movements on the issue of responsibility in spite of their putatively pro-responsibility focus. Finally, Part II exposes the current American system's failure to balance responsibilities between the institution and the individual.

As a means of illustrating what is often an insular American approach to legal problems, Part III examines the European civil law history of evaluating victim responsibility and explores the theoretical underpinnings of that system.¹⁸ Part IV describes the European Community's treatment of this subject in its Products Liability

18. That this article will examine the European history of treating victim fault is necessarily an overstatement. To do this adequately would require an observation of the diverse cultures of the European continent and an understanding of the evolution of those cultures as they relate to their legal systems. The effort to make such observations is partially the business of comparative law and has generated volumes of works. See generally RAOUL C. VAN CAENEGEM, *AN HISTORICAL INTRODUCTION TO PRIVATE LAW* (D.E.L. Johnston trans., 1992) (discussing origin of private law from English common law and continental civil law); 1-2 KONRAD ZWIEGERT & HEIN KOTZ, *AN INTRODUCTION TO COMPARATIVE LAW*, (Tony Weir trans., 2d ed. 1987) (outlining European Community's treatment of comparative law). This article concentrates on the way the issue has been treated by the European Community, and uses historical explanations to enlighten the current treatment.

The natural limit to this effort is the limit imposed by the cultural biases that are inherent in each individual.

Cross-cultural observation is difficult, not because other groups—cultures, classes, castes, tribes, language and dialect communities, religious communities, gender communities, whatever—are more complex than we are, but because each of us is profoundly shaped, at levels of consciousness so deep that we are unaware of it, by our own culture's categories. We observe others in our terms.

W. Michael Reisman, *Autonomy, Interdependence, and Responsibility*, 103 YALE L.J. 401, 403 (1993). Each observer of another culture must try to recognize her own perceptions and be sensitive to the conclusions that those perceptions may affect. Legal scholars studying and analyzing legal systems and approaches to societal problems are probably prone to stubbornness in ways that other cultural observers are not; our tendency toward dogmatism and self-importance is legendary. Acknowledging the importance of the observers' perceptions does not make the observations less valuable; rather, they add to the spice of the debate. See also Lawrence M. Friedman, *Some Thoughts on Comparative Legal Culture in Comparative and Private International Law—ESSAYS IN HONOR OF JOHN HENRY MERRYMAN* 51 (David S. Clark ed., 1990).

Directive which adopted strict products liability.¹⁹ The EC's treatment is enlightening because it relies heavily on the American experience in its decision to adopt strict products liability, while refusing to adopt the labyrinthine American method of evaluating victim fault. Part IV uses the European model as a critique of our own efforts at balancing responsibility and proposes the European effort as more responsive to responsibility concerns.

The Article concludes, in Part V, that our system of evaluating victim conduct compels an overly strict, almost self-righteous, evaluation of the individual victim's responsibility. On the other hand, our system does not similarly evaluate the institution's responsibility in producing and marketing the defective product. The commonly held belief that juries tend to be overly sympathetic to injured plaintiffs has created a system that not only does not promote responsibility but rewards avoidance of responsibility by the institutions that create the harms in the first place. The result has been to unnecessarily and unfairly consider victim fault in avoidance of liability. Part V proposes a system of evaluating individual and institutional responsibility, based in part on the EC and French approaches, which evenly and fairly balances the responsibilities owed. Such a system evaluates conduct based on its effect on the person or group to whom the institution or individual owed a re-

19. For a discussion of the European Community's treatment of strict liability, see *infra* notes 179-90 and accompanying text.

The Products Liability Directive 85/374 of July 25, 1985 is authorized by Article 100 of the Treaty of Rome, establishing the European Community, which provides: "The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or function of the common market." Treaty of Rome, Mar. 25, 1957, art. 100, PAUL MINET, FULL TEXT OF THE ROME TREATY AND AN ABC OF THE COMMON MARKET 93, 114 (4th ed. 1962).

"The Council" refers to the Council of Europe and the "Commission" refers to the European Commission. The European Commission consists of fourteen members, who are appointed through mutual agreement among the member states. *Id.* at art. 157. Each commissioner acts independently of his national government and of the Council of Europe, which was created in 1949 principally for military and economic purposes. The Commission acts as the guardian of the treaties, and has the power to take any organization or individual violating a treaty provision or Community legislation to the European Court of Justice. The Commission alone has the power to initiate legislative proposals and advocate the Community's interest before the Council of Europe. The Council is the legislative body for the EEC. DOMINICK LASOK & JOHN W. BRIDGE, LAW & INSTITUTIONS OF THE EUROPEAN COMMUNITIES 214-24, 227-31 (5th ed. 1991); see also William Boger, *The Harmonization of European Products Liability Law*, 7 FORDHAM INT'L L.J. 1, 2-6 (1984) (outlining EEC directive for strict liability concerning defective products); Jack J. Coe, Jr., *Products Liability in the European Community—An Introduction to the 1985 Council Directive*, 10 J. PROD. LIAB. 197, 200-05 (1987) (explaining political history of Directive).

sponsibility to act carefully.²⁰ That person may be a party to a pending products liability lawsuit or she may not. She may be one of the thousands of persons who purchase products every day and who, fortunately, has not yet been injured. She may be a family member of the victim to whom the victim owed a responsibility to protect and nurture. This proposal requires an understanding and appreciation of the relationship to which obligations attach that is ignored in the present system, which embraces the avoidance of responsibility.

II. THE HISTORICAL AMERICAN TREATMENT OF VICTIM FAULT

A. *Contributory Negligence as an Aid to the Industrial Revolution—A Response to Perceived Jury Sympathy*

The history of contributory negligence and its substantially giving way to comparative negligence has been well documented.²¹ Contributory negligence was apparently considered by many jurists of the nineteenth century as a means of effective jury control at a

20. Glimpses of this notion have surfaced in earlier writing on contributory negligence and even briefly in the Restatement (Second) of Torts. See RESTATEMENT (SECOND) OF TORTS § 463 cmt. b, § 464 cmt. f (1965) (stating individuals need not take same precaution to protect themselves as they would to protect others); James, *supra* note 5, at 723-29 (identifying double standard in application of negligence and contributory negligence).

21. For a discussion of the displacement of contributory negligence with comparative fault, see James, *supra* note 5. *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809), heralded the ignominious beginning to a rule that plaintiff's unreasonable care could totally bar recovery, even for injuries at least partially caused by another's negligence. Since that time, and the rule's substantial adoption in this country, there was great outcry about the harshness of the rule and its inherent unfairness to injured persons. The adoption of comparative fault principles in this country began in earnest in the 1960s and 1970s. The reasonableness of the principle that plaintiff should still be able to recover from a negligent actor who at least partially caused her injuries is now widely accepted. See David C. Sobelsohn, *Comparing Fault*, 60 IND. L.J. 413-15 (stating that there is conquest of American principle of comparative fault because 44 states have adopted comparative fault doctrine).

The adoption of comparative negligence principles in strict products liability cases has been widely accomplished, either by judicial means through the interpretation of state comparative negligence/fault statutes, or through legislative means. *Id.* at 430-35. A debate still exists over whether it is intellectually honest to "compare" a plaintiff's negligence and a defendant's strict liability for a product defect, but most commentators are uneasy with this comparison, particularly when they couch it in terms of comparative causation and not fault. *Compare Murray v. Fairbanks Morse*, 610 F.2d 149, 154-63 (3d Cir. 1979) (finding comparative causation in strict products liability appropriate under comparative negligence statute) with *Conti v. Ford Motor Co.*, 578 F. Supp. 1429, 1432-34 (E.D. Pa. 1983) (holding that comparative negligence statute does not include strict products liability actions), *rev'd on other grounds*, 743 F.2d 195 (3d Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985). For a discussion of the application of comparative fault in strict products liability, see *infra* notes 44-53 and accompanying text.

time when the ever-increasing capacity of institutions to harm in mass quantities was becoming evident.²² According to most legal historians, the industrial revolution acted as a spur to the increasing use of negligence as a basis of liability in lieu of strict liability.²³ The use of contributory negligence as a total bar to recovery was a corollary to the increased reliance on negligence as a basis for liability. Some commentators also saw it as consistent with the puritanical philosophy of the early nineteenth century, which refused to

22. See Malone, *supra* note 5, at 159-60. In this article, Professor Malone analyzes the move toward contributory negligence as a means of jury control to alleviate the perceived "marked change in the frame of mind of the average jurymen." *Id.* at 156. Malone comments that the jurymen "quickly adopted the attitude that has characterized him ever since in claims against corporate defendants. He became distinctly and, at least for a time, incurably, plaintiff-minded." *Id.* Professor Malone relies primarily on the observations of a few judges for this conclusion. The "deep pockets" theory of jury action originated with

[t]he substitution of the bloodless and impersonal corporate defendant for the neighbor whose individual circumstances were known to the jurymen, and the deep pockets of the railroad companies whose new business was thriving and which could meet their judgments with no apparent inconvenience, all added up to an attitude of complete indifference to any persuasive claims that the defendants could muster.

Id. at 157; see also James, *supra* note 5, at 692-96. In describing the source of the doctrine of contributory negligence, Professor James states:

The economic developments of the time were accompanied by the growth of an individualistic political and economic philosophy which regarded as a great social good freedom of action, in nearly all directions, particularly on the part of the entrepreneurial class. Naturally this philosophy would decry the placing of serious burdens on the new and promising system and would deplore the tendency of juries to lose sight of broader philosophical objectives in their sympathies in the single case before them. It was in this climate of opinion that the liability of defendants became limited by the fault principle and that courts came to be regarded as the refuge of those who could not protect themselves—not for those who could (according to the individualistic notions of the times), but simply failed to do so.

James, *supra* note 5, at 695-96.

23. See generally LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 300 (2d ed. 1985) (stating that preindustrial society experienced few personal injuries because there were few modern tools and machines to maim and kill and maintaining that laws needed to be changed to distribute burden of accidents in new age of machines). But see Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641, 670-85 (1989) (discounting strict liability's novelty in 19th century tort law by showing continued interplay between strict liability, negligence liability and no liability); Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1722-34 (1981) (demonstrating that 19th century negligence rule evolved from existing common law and was not drastically different). For an excellent discussion of the policies on which early tort decisions were based, see Robert J. Kaczorowski, *The Common Law Background of Nineteenth Century Tort Law*, 51 OHIO ST. L.J. 1127, 1128 (1990) (explaining history of tort law as a policy-based system of liability in which judges "used tort law to make people behave in morally appropriate ways by holding them to community standards of reasonable behavior in the circumstances in order to minimize injuries and losses, and to promote honesty and fairness in economic relationships").

aid a wrongdoer.²⁴

Even early on, contributory negligence as a total bar to recovery received unequal treatment by the courts and evoked dissatisfaction in cases where the defendant's conduct was perceived to be qualitatively more serious than the plaintiff's.²⁵ For example, contributory negligence was not considered a defense to liability based on an extra-hazardous activity. The reasoning was that such liability is not based on the defendant's fault but rather on the defendant's ability to spread the loss from the enterprise's casualties.²⁶ Similarly, contributory negligence was not considered a defense to willful, wanton or reckless conduct because of the qualitative difference between the defendant's conduct, deserving of greater social condemnation, and the plaintiff's conduct.²⁷

B. *Comparative Negligence Emerges as an Aid to Fairness*

The movement toward comparing plaintiff and defendant fault, so as to ameliorate the harshness of the total bar of contributory negligence, gained momentum in the early twentieth century, only shortly after the contributory negligence rule had been adopted by many jurisdictions.²⁸ The Federal Employers Liability

24. John W. Wade, *Comparative Negligence—Its Development in the United States and its Present Status in Louisiana*, 40 LA. L. REV. 299, 300 (1980). Dean Wade also notes that the time of growth in acceptance of contributory negligence was a time in legal history when jurists and academics thirsted for simple and categorical answers to complex questions. *Id.* Several examples of this desire come readily to mind: No contribution among joint tortfeasors, all-or-nothing causation in the form of the but-for rule, no apportionment of damages among joint tortfeasors. *Id.*

25. Malone, *supra* note 5, at 169-74. After recounting the history of the doctrine in some detail, Professor Malone shows a bit of the realist:

There is no moral from the foregoing pages to impress upon the reader. Courts wanted to control juries during the last century, they want to control them today, and they will probably want to continue to control them in the future. If we take away contributory negligence from the judges, they will find some other way. It's hard to beat judicial ingenuity.

Id. at 182; see also James, *supra* note 5, at 704 ("[A]lmost from the very beginning there has been dissatisfaction with the Draconian rule sired by a medieval concept of cause, out of a heartless laissez-faire.").

26. See James, *supra* note 5, at 712 (stating that society has permitted ultrahazardous activities on condition that defendant compensate those injured by its peculiar hazards). The goal of loss allocation is, of course, one of the primary motivators behind courts recognizing strict liability for product-related injuries.

27. See *id.* at 709-10 (explaining that willful and wanton misconduct is different in kind from negligence). See generally PROSSER & KEETON ON TORTS, *supra* note 7, § 65 at 462.

28. See Robert G. Leflar, *The Declining Defense of Contributory Negligence*, 1 ARK. L. REV. 1, 16-19 (1946) (describing rise of comparative negligence soon after contributory negligence was recognized as defense); A. Chalmers Mole & Lyman P. Wilson, *A Study of Comparative Negligence*, 17 CORNELL L.Q. 333, 333-38 (1932)

Act (FELA) adopted a comparative negligence standard in 1908.²⁹ Comparative negligence has always been the rule in admiralty law.³⁰ The use of comparative negligence in these circumstances, coupled with the perceived unfairness of the total bar to recovery, weighed heavily in favor of abolishing contributory negligence in ordinary negligence cases as well.

Nevertheless, most states did not readily adopt comparative negligence, even given the federal statutory example. A few states adopted comparative negligence for general accident litigation as early as 1910,³¹ but by the mid-1960s, only a few jurisdictions had followed suit.³² Not until the 1970s did most jurisdictions make the switch to comparative negligence.³³ As of 1993, all but seven jurisdictions have adopted some form of comparative negligence.³⁴ Like many efforts at law reform, it takes a long time to effect change in the face of strong and powerful opposition.

(same); William L. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 467-75 (1953) (same); Ernest A. Turk, *Comparative Negligence on the March*, 28 CHI-KENT L. REV. 189, 208-18 (1950) (same); Thomas P. Whelan, *Comparative Negligence*, 1938 WIS. L. REV. 465, 469-73 (same).

29. 45 U.S.C. § 51 (1946). FELA applied to railroad workers injured in the course of their employment.

30. In the United States, admiralty cases were governed by the equal division rule by which plaintiff and defendants shared equally in the apportionment of damages if found at fault. See PROSSER & KEETON ON TORTS, *supra* note 7, § 67, at 471. The United States Supreme Court adopted pure comparative negligence in admiralty cases in 1975, altering the even division rule and requiring an apportionment of damages based on each party's share of the fault. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411 (1975); see also Merchant Marine Act of 1920, 46 U.S.C. § 688 (1988) (discussing comparative negligence under Jones Act).

31. See, e.g., MISS. CODE ANN. § 11-7-15 (1910) (preventing contributory negligence from barring recovery, but allowing recovery to be diminished).

32. PROSSER & KEETON ON TORTS, *supra* note 7, § 67, at 471. The reason for the slow adoption of comparative fault is unclear. Some observers point to the campaign waged by insurance companies and major corporate defendants because of their fear of comparative negligence. See Christopher Curran, *The Spread of the Comparative Negligence Rule in the United States*, 12 INT'L REV. L. & ECON. 317, 319-27 (1992) (relying on interest group analysis to conclude that manufacturers had overwhelming interest in maintaining contributory negligence as total bar to recovery). But see WILLIAM M. LANDES & RICHARD A. POSNER, *ECONOMIC ANALYSIS OF TORT LAW* 550 (2d ed. 1987) (demonstrating that inefficiency of comparative negligence acted as impediment to its adoption). See generally SCHWARTZ, *supra* note 9, at 8-27 (exploring operation of comparative negligence relating to contributory negligence and other legal doctrines).

33. PROSSER & KEETON ON TORTS, *supra* note 8, § 67, at 471; see also Wade, *supra* note 24, at 299-309 (describing Louisiana's movement toward adoption of comparative fault as following common law principles whose policies were equivalent to those of comparative negligence).

34. The following states retain contributory negligence as a bar to recovery in general accident litigation: Alabama, Maryland, North Carolina, South Carolina, Tennessee, Virginia and District of Columbia. See SCHWARTZ, *supra* note 9, at 1-27.

C. *Victim Fault in Products Liability*

In the late 1950s and early 1960s while comparative fault advocates were building up steam, the American Law Institute was in the process of rewriting the Restatement of Torts. This effort produced section 402A on strict products liability.³⁵ Section 402A was first introduced in 1961 and underwent a number of revisions.³⁶ During the general restating effort, the reporters engaged in a heated debate over whether there was any meaningful difference between contributory negligence and assumption of the risk as defenses to negligence.³⁷ In the year following this debate, there appeared the first, and only, reference to victim fault in section 402A, comment n.³⁸ Comment n suggested that contributory negligence should not bar a plaintiff's recovery because the nature of the liability was "no-fault." According to comment n, only voluntary and unreasonable assumption of the risk should act as a total bar to recovery.³⁹ There was no mention of comparative fault and its operation in strict products liability.

In light of the traditional view that contributory negligence is not a bar to actions based on strict liability, comment n appears

35. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

36. See RESTATEMENT (SECOND) OF TORTS § 402A (Tentative Draft No. 6, 1961) (focusing on liability for contaminated food without commenting on contributory negligence); see also *id.* (Tentative Draft No. 10, April 20, 1964) (containing extensive note on contributory negligence); *id.* (Tentative Draft No. 7, 1962) (same).

37. See RESTATEMENT (SECOND) OF TORTS §§ 496A-G (Tentative Draft No. 9, 1963). There was no discussion, however, of the impact of plaintiff fault on products liability, except for a passing reference to the difference between contributory negligence, which was not a defense to strict liability actions; and assumption of the risk, which was a defense to strict liability actions.

38. See RESTATEMENT (SECOND) OF TORTS § 402A, cmt. n (1965). Comment n states:

n. Contributory negligence. Since the liability with which this section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases . . . applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

Id. When section 402A was discussed again, in Tentative Draft No. 10, 1964, comment n, as it appears today, appeared without fanfare. It would be speculative to discuss why it appeared in this manner but not unreasonable to surmise that the heated debate on contributory negligence and assumption of the risk may have effected the way the topic was treated in reference to section 402A liability.

39. *Id.*

consistent with the idea that victim conduct should be considered only when a balancing of responsibilities so indicates. Because strict liability generally fulfills a risk-distributive goal, consideration of victim fault that does not rise to the level of assuming the risk is inappropriate. The institution generating the risk is invariably better able to reallocate the loss than the victim who is unaware of the magnitude of the risk.

The authors of the Uniform Comparative Fault Act, however, did not see things quite this way.⁴⁰ Because it was akin to negligence per se, the drafters considered strict liability to be sufficiently fault-based to justify inclusion in a comparative fault approach.⁴¹ In the move toward greater fairness to the parties, the drafters sought an all-inclusive approach.⁴² In fairness to the drafters, many jurisdictions that were considering whether to apply comparative fault to strict products liability also decided that such a comparison was not only possible, but appropriate.⁴³

40. UNIF. COMPARATIVE FAULT ACT (UCFA) § 1(b), 12 U.L.A. 44 (1977) (including strict tort liability in "fault").

41. *See id.* (discussing strict liability in comments to UCFA). The drafters said: Strict liability for both abnormally dangerous activities and for products bears a strong similarity to negligence as a matter of law (negligence per se), and the factfinder should have no real difficulty in setting percentages of fault. Putting out a product that is dangerous to the user or the public or engaging in an activity that is dangerous to those in the vicinity involves a measure of fault that can be weighed and compared, even though it is not characterized as negligence.

Id.; *see also* John W. Wade, *A Uniform Comparative Fault Act—What Should it Provide?*, 10 U. MICH. J.L. REF. 220, 226-27, 229 (1977) ("Putting out a defective and dangerous product or engaging in abnormally dangerous activities involves a measure of fault that cannot be weighed and compared, even though there is no negligence.").

42. *Compare* Wade, *supra* note 41, at 233 (noting areas in which Committee was not in general agreement, including coverage of Act to include torts other than negligence and contributory negligence) *with* John W. Wade, *The Uniform Comparative Fault Act*, 14 FORUM 379, 389 (1979) (including strict liability in types of conduct covered by Act).

43. *See* Murray v. Fairbanks Morse, 610 F.2d 149, 162 (3d Cir. 1979) (concluding that comparative fault system will lead to more equitable results in strict product liability cases); *Daly v. General Motors Corp.*, 575 P.2d 1162, 1169 (Cal. 1978) (requiring application of comparative fault principles in strict products liability); *see also* Aaron D. Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 331 (1977) (stating that "[i]n this imperfect world it is not an outrageous inference that a bad defect most probably stems from serious fault—even if the fault need not nor cannot be established."); John W. Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 377 (1978) ("In the case of products liability, the fault inheres primarily in the nature of the product. The product is 'bad' because it is not duly safe; it is determined to be defective and (in most jurisdictions) unreasonably dangerous. . . . [S]imply maintaining the bad condition or placing the bad product on the market is enough for liability. . . . One does not have to stigmatize conduct as negligent in order to characterize it as fault.").

III. CURRENT AMERICAN TREATMENT OF VICTIM FAULT IN PRODUCTS LIABILITY ACTIONS

This Section of the Article describes the current method by which four representative American jurisdictions evaluate victim conduct. Victim fault is treated in a variety of ways due to the effect of changes wrought by the adoption of comparative fault and other tort reforms. The four jurisdictions chosen reflect the four basic ways American jurisdictions treat this issue. These jurisdictions also illustrate the negative effect that the recent tort reform movements have had on institutional responsibility.

A. *Categories of Victim Conduct*

American jurisdictions describe the plaintiff's conduct, which is relevant to determining the extent of a defendant's liability, in numerous ways. Each focuses inordinately on the plaintiff's conduct and, consequently, creates unnecessary confusion. The terms contributory negligence, comparative negligence, comparative fault, product misuse—foreseeable or unforeseeable, abnormal use—foreseeable or unforeseeable, assumption of risk and others are used to describe the victim conduct that may be at issue.⁴⁴

Why have so many defenses based on plaintiff conduct taken root in our products liability jurisprudence? One would think that with the adoption of comparative fault and the ongoing debate over whether assumption of risk should be considered simply a category of contributory negligence,⁴⁵ the trend is away from the compartmentalizing and categorizing of defenses that has occurred in products liability.⁴⁶ It appears that with defenses to products liability

44. For a general description of these categories of plaintiff conduct, see 3 AMERICAN LAW OF PRODUCTS LIABILITY, pt. 12 (3d ed. 1992) and 1A LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY § 2.27(1) (1992). At least six categories of plaintiff fault have been identified as subject to comparison in product liability cases to reduce or bar recovery. COMPARATIVE NEGLIGENCE: LAW AND PRACTICE § 9.40 (1985); see also Dix W. Noel, *Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk*, 25 VAND. L. REV. 93 (1972) (detailing early theories on applicability of fault defenses in strict liability); Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213, 247-78 (1987) (defending assumption of risk as a separate defense from contributory negligence especially in product liability cases).

45. For a discussion of this debate in the ALI, see *supra* note 37 and accompanying text.

46. Many comparative fault statutes, including the Uniform Comparative Fault Act, define the fault that reduces plaintiff's recovery in very broad terms to include the categories described above. See, e.g., ILL. REV. STAT. ch. 110, para. 2-1116 (1991) (reducing recovery by proportion of contributory fault by plaintiff, barring recovery if fault exceeds 50%); KY. REV. STAT. ANN. § 411.182(2) (Baldwin 1989) (directing trier of fact to consider nature and causal relation of each party's

ity actions, the idea that "more is better" controls, despite the resulting confusion. In addition, victim conduct defenses have expanded following the alleged "tort/insurance crisis" of the 1980s.

B. *Illustrative Jurisdictions*

The representative jurisdictions used to describe the American treatment of victim fault are Illinois, Colorado, Ohio and Texas. Illinois is significant because it recently revised its comparative fault statute, changing from a pure system to a modified comparative fault scheme.⁴⁷ In doing so, it broadened the types of plaintiff fault that are considered relevant in products liability actions. Consequently, the Illinois statute is now a very pro-defendant statute.⁴⁸

Colorado, like many jurisdictions, has a pure system of compar-

conduct). In jurisdictions where the applicable statute does not specifically include all former specific categories of plaintiff fault, the judiciary has had to interpret the provisions and the results of these interpretations vary widely, retaining many of the former distinctions in types of plaintiff fault. *See, e.g.,* Huffman v. Caterpillar Tractor Co., 908 F.2d 1470, 1473 (10th Cir. 1990) (interpreting Colorado law to require very broad reading of contributory fault in Colo. Rev. Stat. § 13-21-406); Gratzle v. Sears, Roebuck & Co., 613 N.E.2d 802, 804 (Ill. App. Ct. 1993) (interpreting contributory fault to include assumption of risk); Suter v. San Angelo Foundry & Mach. Co., 406 A.2d 140, 145-46 (N.J. 1979) (including negligence in concept of tortious fault in comparative fault statute).

47. The modified comparative fault schemes apportion liability based on the percentages found by the jury but plaintiff is barred from recovery if he is more at fault than the defendants, as in Illinois, or if he is equal to or more at fault than the defendants, as in Kansas. *See* ILL. REV. STAT. ch. 110, para. 2-1116 (1991); Forsythe v. Coats Co., 639 P.2d 43, 46 (Kan. 1982). For a catalogue of the ways in which jurisdictions treat comparative fault, see 3 AMERICAN LAW OF PRODUCTS LIABILITY §§ 40:37-45 (3d ed. 1992). For a discussion of the policies and rationales behind each approach, see David C. Sobelsohn, "Pure" vs. "Modified" Comparative Fault: Notes on the Debate, 34 EMORY L.J. 65 (1985) (presenting and analyzing the different approaches to comparative fault); Robert N. Strassfeld, *Causal Comparisons*, 60 FORDHAM L. REV. 913, 915-16 (1992) (describing the comparative fault schemes and advocating comparison based on causal relationships and not on fault); Wade, *supra* note 41, at 225 (expressing that pure form of comparative negligence is better because it properly divides the total loss while modified approaches fluctuate "wildly").

48. There are, of course, more pro-defendant schemes, such as in those jurisdictions that have retained contributory negligence as a total bar to recovery in all actions. North Carolina and Virginia, for example, still retain contributory negligence. *See* N.C. GEN. STAT. § 99B-4(1), (3) (1992); Ford Motor Co. v. Bartholomew, 297 S.E.2d 675 (Va. 1982). *See generally* 3 AMERICAN LAW OF PRODUCTS LIABILITY § 40:28 (3d ed. 1992) (stating that Alabama, District of Columbia, Maryland, North Carolina and Virginia retain contributory negligence). Because these jurisdictions are few, I shall concentrate in this article on mainstream approaches to plaintiff fault. Although the fairness of the comparative fault approach is universally given as the reason for its adoption, some argue that the contributory negligence principle is more efficient and thus ultimately more fair. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 6.4, at 169-75 (4th ed. 1992); cf. Robert D. Cooter & Thomas S. Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. REV. 1067, 1071 (1986) (arguing that comparative negligence is most efficient

active fault for any foreseeable plaintiff misconduct.⁴⁹ Colorado recently enacted this statute, after many years under a judicially created scheme that recognized only assumption of risk and unforeseeable product misuse as defenses to strict products liability actions. Unlike its previous victim-friendly approach, Colorado's current middle-of-the-road approach has been widely followed.⁵⁰ Colorado's recent change makes it worth studying in some detail because it reflects the angst that products liability recovery has caused so many legislators, insurers and businesspersons.

Ohio has a comparative fault statute that closely follows comment n to section 402A and bars recovery as a result of assumption of risk or unforeseeable product misuse. Like the former Colorado procedure, it does not consider other forms of contributory fault.⁵¹ The state of Ohio is in the most pro-plaintiff category, even though the recent reforms provide additional plaintiff conduct defenses for non-manufacturers.⁵²

Finally, Texas is notable in that its system, which parallels the Model Uniform Product Liability Act (MUPLA), purports to be one of "comparative responsibility" and appears, at first, to parallel this Article's proposition.⁵³ The Texas/MUPLA approach is discussed primarily to distinguish it from the comparative responsibility this Article advocates. This Article focuses on responsibility to relationships. The Texas/MUPLA approach, on the other hand, is merely

when parties are "symmetrically situated with respect to [their] ability to take precautions").

49. COLO. REV. STAT. § 13-21-406 (1980 & Supp. 1988). Pure comparative fault schemes apportion liability based on the percentages of fault the jury attributes to each party or potentially culpable party, depending on the wording of the statute. This enables the plaintiff that is 99% at fault to recover the 1% of his damages from the remaining defendants who were 1% at fault. Examples of this type of scheme can be found in California by judicial decision, in Florida by statute, and, after a long history of turmoil, in New York by statute. See e.g., FLA. STAT. ch. 768.81 (1992); N.Y. CIV. PRAC. L. & R. 1411 (McKinney 1976); *Daly v. General Motors Corp.*, 575 P.2d 1162, 1167 (Cal. 1968).

50. For a discussion of Colorado's approach, see *infra* notes 70-89 and accompanying text.

51. OHIO REV. CODE ANN. § 2315.19-20 (Anderson 1988). For a discussion of the Ohio approach, see *infra* notes 90-103 and accompanying text.

52. For a discussion of defenses for non-manufacturers in Ohio, see *infra* notes 97-99 and accompanying text.

53. TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (West 1986). For a discussion of the Texas approach, see *infra* notes 104-112 and accompanying text. The Model Uniform Product Liability Act, or MUPLA as it has come to be known, was promulgated by the Commerce Department in 1979 as a model for states and has served as a resource for many product liability statutes and alleged reforms. Model Uniform Product Liability Act, 44 Fed. Reg. 62,714 (1979).

the product of tort reforms that exclusively favor product liability defendants while having no relation to responsibility.

1. *Illinois*

In 1991, Illinois abolished the pure comparative negligence system previously adopted by its Supreme Court in 1981.⁵⁴ Until that time, Illinois had long sought fair treatment of victim fault through an open balancing of conduct.⁵⁵ Illinois was one of the jurisdictions that applied a slight/gross distinction to alleviate the harshness of the contributory negligence bar.⁵⁶

Under the revised Illinois system, a plaintiff's "contributory fault" may bar recovery if it exceeds fifty percent of the proximate cause of the damages suffered.⁵⁷ If not more than fifty percent at fault, plaintiff's recovery is reduced by his percentage of fault, as in many modified comparative fault schemes.⁵⁸ The statute does not

54. See *Alvis v. Ribar*, 421 N.E.2d 886, 898 (Ill. 1981) (holding that pure comparative fault would replace comparative negligence in Illinois). The common law standard of pure comparative negligence, as set forth in *Coney v. J.L.G. Indus. Inc.*, 454 N.E.2d 197 (Ill. 1983), for strict liability actions, was replaced by an Illinois statute. See ILL. REV. STAT. ch. 110, para. 2-1116 (1987). The statute was applicable to causes of action accruing on or after Jan. 1, 1986. *Id.*

55. See *Malone*, *supra* note 5, at 170 (discussing attempts by Illinois courts "to proceed openly upon the premise of balancing fault"); see also Leon Green, *Illinois Negligence Law*, 39 U. ILL. L. REV. 36, 47-54 (1944) (discussing struggle in 1944 between comparative and contributory negligence).

56. See *Wade*, *supra* note 24, at 300. Dean Wade identifies the increased appellate litigation that stems from the slight-gross distinction as a reason why Illinois and other jurisdictions stopped using it. See PROSSER & KEETON ON TORTS, *supra* note 7, § 67, at 469-70 (seeking slight-gross distinction to modify harshness of contributory negligence rule).

57. ILL. REV. STAT. ch. 110, para. 2-1116. In *Coney*, the court had held that ordinary contributory negligence in the nature of unreasonable or careless behavior regarding the finding of or being attentive to a defect did not reduce a plaintiff's recovery in strict products liability actions. *Coney*, 454 N.E.2d at 204. The statute's use of the term "contributory fault" could easily be read to overrule the holding of *Coney*. No case has addressed this issue. Given the statute's "reform" effort to reduce the imposition of liability, however, this possible interpretation would make the statute even more pro-defendant than it already is. See *Timmerman v. Modern Indus., Inc.*, 960 F.2d 692, 698 (7th Cir. 1992) (precluding recovery in wrongful death action where decedent's negligence was greater than 50% of proximate cause of accident); *Akerberg v. Metropolitan Rail*, 773 F. Supp. 111, 114 (N.D. Ill. 1991) (precluding recovery in personal injury cases where plaintiff is more than 50% responsible); *Fetzer v. Wood*, 569 N.E.2d 1237, 1240 (Ill. App. Ct. 1991) (restating that there is no recovery if plaintiff is more than 50% at fault).

58. ILL. REV. STAT. ch. 110, para. 2-1116. For a discussion of the differences between pure and modified comparative fault statutes generally, see *supra* notes 47, and 49. There are a variety of modified comparative fault schemes, some of which change the threshold of plaintiff fault before recovery is barred. See, e.g., ARK. CODE ANN. § 16-64-122 (Michie 1987 & Supp. 1993) (discussing, in notes, comparative fault statute and stating "contributory negligence does not bar a plaintiff's recovery if it is of less degree than that of the defendant"); KAN. STAT. ANN.

define contributory fault, but the term has been interpreted to include findings of assumption of risk.⁵⁹ Assumption of risk generally requires: (1) a finding of subjective knowledge of danger by the plaintiff; (2) an understanding and appreciation of the danger and (3) voluntary acceptance of that danger—these elements are required in most jurisdictions that recognize assumption of risk as a defense.⁶⁰

An excellent example of the different treatment that plaintiffs

§ 60-258a (Supp. 1993) (allowing recovery where negligence is less than causal negligence of other party or parties). See generally SCHWARTZ, *supra* note 9, at 43-78 (describing pure, equal division, slight/gross distinction and 50% systems).

59. For a discussion of assumption of the risk as a category of contributory negligence, see *supra* note 37. See also *Gratzle v. Sears, Roebuck & Co.*, 613 N.E.2d 802, 804-05 (Ill. App. Ct. 1993) (plaintiff injured when using table saw recovered despite jury finding of his 60% contributory fault; reversed for new instructions under revised statute). Illinois had also previously considered assumption of risk to reduce plaintiff's recovery but not to bar it. *Faucett v. Ingersoll-Rand Mining & Mach. Co.*, 960 F.2d 653 (7th Cir. 1992); *Coney*, 454 N.E.2d at 197. While this change in Illinois' approach to comparative fault heralds a pro-defendant policy, juries must be instructed about the effect of their finding of greater than fifty percent plaintiff fault under the new statute, which may ameliorate the harshness of the rule. See *Gratzle*, 631 N.E.2d at 805 (finding that ILL. REV. STAT. ch. 110, para. 2-1107.1 is intended to notify juries of effect of determination of apportioned fault).

60. See, e.g., *Hanlon v. Airco Indus. Gases*, 579 N.E.2d 1136, 1141 (Ill. App. Ct. 1991) (stating that proof of decedent's awareness of danger of pressurized tank that exploded may include circumstantial evidence); *Skonberg v. Owens-Corning Fiberglass Corp.*, 576 N.E.2d 28, 35-36 (Ill. App. Ct. 1991) (noting that asbestos worker who was exposed to significant amount of information regarding dangers of asbestos did not have subjective knowledge required); *Byrne v. SCM Corp.*, 538 N.E.2d 796, 816 (Ill. App. Ct. 1989) (finding paint manufacturer failed to demonstrate sufficiently that hospital employee assumed specific risk for injuries sustained by inhalation of toxic fumes even though employee knew mask would be necessary and failed to obtain one).

In *Erickson v. Muskin Corp.*, the Illinois Appellate Court discussed assumption of the risk in a failure to warn claim involving an above-ground swimming pool. 535 N.E.2d 475 (Ill. App. Ct. 1989), *overruled on other grounds*, *Blagg v. Illinois F.W.D. Truck & Equip. Co.*, 572 N.E.2d 920 (Ill. 1991). The court held that assumption of risk could be asserted as a defense even though the jury had found the product defective for not having a warning about the danger that plaintiff was supposed to have assumed. *Id.* at 479. The court, after expressing its annoyance about the confused state of contributory fault in Illinois after passage of the tort reform statute, concluded that the jury was not required to believe that the plaintiff lacked knowledge. *Id.* at 478-79. In addition, the subjective nature of the test made the defense applicable to plaintiffs' claims of failure to warn because of the difference in the nature of the inquiries: one is fault, the other non-fault. *Id.*

The court also intimated that not only should plaintiff's assumption of risk be applicable in failure to warn cases, but plaintiff fault, other than misuse and assumption of risk, should also be relevant, which is contrary to the holding in *Coney*. *Id.* As mentioned earlier, this aspect of the *Coney* holding may not have survived the adoption of paragraph 2-1116 of the new statute. See *Calderon v. Echo, Inc.*, 614 N.E.2d 140, 144-46 (Ill. App. Ct. 1993) (affirming reduction in damages by 90% after finding plaintiff's failure to wear eye protection when operating weed trimmer constituted assumption of risk in failure to warn action). For a discussion

will receive under the new Illinois statute can be found in *Besse v. Deere & Co.*⁶¹ Plaintiff, who had grown up around farm machinery and had driven the combine in question on numerous occasions, was injured while attempting to unclog the cornpicker device on the combine.⁶² Although plaintiff knew she could get caught in the cornpicker while it was running, she left the driver's seat to unclog the cornpicker with the engine running, became entangled, and lost her leg.⁶³ The jury found the combine defective for failure to have a safety switch that would turn the cornpicker off while the operator was out of the driver's seat. After the accident, plaintiff's brother adapted the combine to include such a switch for about twenty dollars.⁶⁴

The jury found plaintiff seventy-five percent at fault and assessed \$1.5 million in damages. After being reduced by plaintiff's fault, the award against the defendant was \$388,750.⁶⁵ This case was tried prior to the adoption of the Illinois statute described above. Under the new statute, plaintiff's recovery would be barred because her non-defect related fault exceeded that of the defendant, regardless of the ease and cost-effectiveness with which the defendant could have altered its design.

In addition to contributory fault, unforeseeable product misuse is an affirmative defense to a products liability action.⁶⁶ Prod-

of the effect of the adoption of paragraph 2-1116 on the holding in *Coney*, see *supra* note 57.

The requirement of subjective knowledge of the product's characteristics and its danger usually serves to limit the harshness of the assumption of risk defense, particularly in those jurisdictions such as Georgia and Alabama that use it as a complete bar to recovery. The extent of knowledge required to constitute actual knowledge of the existence of a defect and the level of appreciation of the risk varies widely in jurisdictions. See *Austin v. Lincoln Equip. Assoc., Inc.*, 888 F.2d 934, 937 (1st Cir. 1989) (relying on Rhode Island law which uses assumption of risk to reduce but not bar plaintiff's recovery); *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1443-44 (10th Cir. 1987) (relying on Kansas law and discussing assumption of risk defense in context of failure to warn allegations), *cert. denied*, 486 U.S. 1032 (1988).

61. 604 N.E.2d 998 (Ill. App. Ct. 1992).

62. *Id.* at 1000.

63. *Id.*

64. *Id.* Deere & Co. likewise finally changed the design of the combine to include such a switch in 1989, eight years after this accident and allegation by others about such a defect. *Id.*

65. *Id.*

66. *Coney v. J.L.G. Indus., Inc.*, 454 N.E.2d 197, 204 (Ill. 1983). Product misuse is not as serious qualitatively as assumption of risk, but it is considered more serious than simple contributory negligence. See *Williams v. Brown Mfg. Co.*, 261 N.E.2d 305, 310 (Ill. 1970) (stating that contributory negligence is not a bar to recovery, unlike product misuse), *overruled on other grounds*, *Coney v. J.L.G. Indus., Inc.*, 454 N.E.2d 197 (Ill. 1983); *Knapp v. Hertz Corp.*, 375 N.E.2d 1349, 1354 (Ill.

uct misuse comes into play when determining whether the product is defective, and most jurisdictions find that a manufacturer's design and warning must take into consideration reasonably foreseeable product misuse.⁶⁷ Product misuse, therefore, comes up in plaintiff's case-in-chief in many jurisdictions. For example, in Illinois, plaintiff must prove the absence of product misuse in his prima facie case as an element of proving that the defect, rather than plaintiff's misuse, was the cause of the injury.⁶⁸ This treatment of product misuse is one of the best examples of the confusion in American products litigation of how to treat victim fault.

Further, in Illinois, as in most jurisdictions, failing to discover a defect or to reasonably inspect for one is not a type of victim fault considered in products liability actions.⁶⁹ The enactment of a comparative fault statute, however, may result in an expansion of the

App. Ct. 1978) (stating that "misuse of a product . . . is qualitatively more serious than simple contributory negligence"). The misuse may also be a manner of use unintended by the manufacturer. *Dukes v. J.I. Case Co.*, 483 N.E.2d 1345, 1358 (Ill. App. Ct. 1985), *aff'd in part and rev'd in part*, 516 N.E.2d 260 (1987). The intention of the manufacturer is considered in determining what is reasonably foreseeable. *Suich v. H & B Printing Mach., Inc.*, 541 N.E.2d 1206, 1213 (Ill. App. Ct. 1989); *Byrne v. SCM Corp.*, 538 N.E.2d 796, 811 (Ill. App. Ct. 1989).

67. See generally JAMES A. HENDERSON, JR. & AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 668-71 (2d ed. 1992).

68. *Whetstone v. Gates Rubber Co.*, 895 F.2d 388, 393 (7th Cir. 1990) (affirming summary judgment for defendant on absence of defect where plaintiff, injured by a bursting anhydrous ammonia hose, could not prove proper use); *Illinois State Trust Co. v. Walker Mfg. Co.*, 392 N.E.2d 70, 73-74 (Ill. App. Ct. 1979) (imposing burden on plaintiff to show absence of product misuse).

Plaintiff misconduct is ordinarily factual and left for the jury, however. *Hedge v. Midwest Contractors Equip. Co.*, 202 N.E.2d 869, 873-74 (Ill. App. Ct. 1964); cf. *Suich*, 541 N.E.2d at 1213 (finding that evidence on foreseeability of misuse was properly before court where no reasonable jury could find that product use in question was unforeseeable due to optional equipment available from manufacturer); *King v. American Food Equip. Co.*, 513 N.E.2d 958, 965 (Ill. App. Ct. 1987) (finding misuse foreseeable and striking defense because equipment was available from manufacturer to prevent accidents like one that injured plaintiff).

69. See *Coney*, 454 N.E.2d at 204 (stating that "a consumer's unobservant, inattentive, ignorant or awkward failure to discover or guard against a defect" should not reduce damages). While this case was decided prior to the reform statute, it has been relied on by cases after its enactment. See, e.g., *Gratzle v. Sears, Roebuck & Co.*, 613 N.E.2d 802, 804 (Ill. App. Ct. 1993) (citing *Coney* for proposition that assumption of risk would not bar recovery in strict liability). However, because of the possible breadth of the statutory term "contributory fault," the type of plaintiff fault that is relevant in Illinois products liability actions could well be broadened, particularly in light of the apparent intent of the legislature to limit recovery. The former Illinois approach is consistent with comment n to section 402A of the Restatement (Second) of Torts which specifically declares that contributory negligence in failing to discover a defect variety is not relevant in strict products liability actions. RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965). For further discussion of that comment and the Restatement approach, see *supra* notes 35-39 and accompanying text.

categories of plaintiff fault that may reduce or bar recovery. If the purpose of a statute is to reduce liability, that result is likely only because of the broadened scope of victim fault available, not because products are less defective or because institutions have become more responsible for their products.

2. Colorado

In *Kinard v. Coats Co.*,⁷⁰ the Colorado Court of Appeals concluded that the previously adopted common law scheme for comparative negligence did not apply to products liability actions.⁷¹ The court's rejection of comparative fault in products liability actions was unambiguous.⁷² Further, the court concluded that only voluntary and unreasonable assumption of the known risk from the specific product defect would constitute a complete defense.⁷³

Subsequently, the Colorado Legislature, presumably influenced by tort reformers who sought to reduce manufacturer liability, enacted a comparative fault statute exclusively for products liability actions. This new statute broadened the categories of plaintiff conduct available as defenses in products liability actions and, consequently, reduced plaintiff's ability to recover.⁷⁴ Interestingly,

70. 553 P.2d 835 (Colo. Ct. App. 1976).

71. *Id.* at 837-38.

72. *Id.* at 837. The court expressed its adherence to the approach outlined in comment n of the Restatement (Second) of Torts § 402A. For a complete discussion of this approach, see *supra* notes 35-39 and accompanying text. Additionally, for a discussion of similar approaches adopted in other jurisdictions, notably in Ohio, see *infra* notes 90-103.

The rationale for rejecting comparative fault in strict products liability actions lies in understanding that fault is not the basis of strict liability, and thus blameworthiness is not in issue. *Kinard v. Coats Co., Inc.*, 553 P.2d 835, 837 (Colo. Ct. App. 1976); see *Daly v. General Motors Corp.*, 575 P.2d 1162, 1181-86 (Cal. 1978) (Mosk, J., dissenting) (stressing that strict products liability is an independent tort in which fault should be irrelevant).

73. *Kinard*, 553 P.2d at 837 (relying on comment n to section 402A of Restatement). In *Union Supply Co. v. Pust*, the Colorado Supreme Court agreed that ordinary contributory negligence is not a defense to strict liability. 583 P.2d 276, 284 (Colo. 1978); see also *Camacho v. Honda Motor Co., Ltd.*, 741 P.2d 1240, 1244 (Colo.), *cert. denied*, 485 U.S. 901 (1987) (stating that assumption of risk is available only if user voluntarily and unreasonably proceeded in face of danger of which user had actual, subjective knowledge); *Union Supply Co.*, 583 P.2d at 284 (holding defendant must demonstrate actual knowledge of specific danger in assumption of risk rather than general knowledge of defect).

74. COLO. REV. STAT. § 13-21-406 (1980 & Supp. 1988). This legislation was enacted in 1981, one of the earliest efforts at tort reform and noticeably before the insurance/tort crisis of the mid-eighties. For a discussion of this statute and its history, see Alan Epstein & I. Richard Musat, *Strict Product Liability and Comparative Fault in Colorado*, 19 COLO. LAW. 2081 (1990).

The Colorado Legislature had enacted a products liability statute in 1977 which codified certain presumptions of nondefectiveness, among other things.

the legislature adopted the pure form of comparative fault in products liability actions.⁷⁵ The comparative negligence statute already in existence had used a modified approach in which the plaintiff recovered only if his negligence was not as great as the person against whom recovery was sought.⁷⁶ One can only speculate that the legislature was effecting a compromise, given the expansion of plaintiff conduct that would constitute a defense beyond that previously allowed. The legislature specifically indicated that the existing comparative negligence statute did not apply to products liability actions.⁷⁷

COLO. REV. STAT. § 13-21-403 (1989). This pro-defendant statute also prevents a seller from being held strictly liable unless the seller is also the product's manufacturer or the manufacturer of the defective component of the product. *Id.* § 13-21-402(1). Much like many similar statutes, this statute provides for an action against the seller in strict liability if the manufacturer is not subject to the jurisdiction of the court. *Id.* § 13-21-402(2).

75. *Id.* This section was enacted in 1981. It was enacted four years after the statute which had attempted to reform products liability actions through evidentiary presumptions in favor of the defendant. COLO. REV. STAT. § 13-21-403 (1977). Examples of such presumptions are: (1) presumption of non-defectiveness after 10 years from date of first sale of product; (2) presumption of non-defectiveness if the product complies with government regulations; and (3) a presumption of non-defectiveness if product complied with state of art at time of manufacture. *Id.* Many jurisdictions have enacted similar presumptions which promote reduced liability. See, e.g., KY. REV. STAT. ANN. § 411.310 (Baldwin 1992).

Many jurisdictions have a pure comparative fault statute like the one currently in effect in Colorado. See, e.g., FLA. STAT. ch. § 768.81 (1992); MICH. COMP. LAWS § 600.2949 (Supp. 1982); N.Y. CIV. PRAC. L. & R. 1411 (McKinney 1976). These statutes do not necessarily mirror the expansiveness of the Colorado statute; the New York statute for example defines relevant conduct as "culpable conduct." N.Y. CIV. PRAC. L. & R. 1411. These jurisdictions consider all types of plaintiff conduct that is negligent, including assumption of risk and foreseeable product misuse. See, e.g., *Mosher v. Speedstar Div. of AMCA Int'l, Inc.*, 979 F.2d 823, 825-26 (11th Cir. 1992) (relying on Florida law—other than sole proximate cause, Florida does not recognize traditional bars to recovery); *Parsons v. Honeywell, Inc.*, 929 F.2d 901, 904-07 (2d Cir. 1991) (relying on New York law—plaintiff misuse usually question for jury on issue of superseding cause as well as comparative fault; summary judgment improper); *Delisa v. Stewart Agency, Inc.*, 515 So. 2d 426, 427-28 (Fla. Dist. Ct. App. 1987) (holding that trial court properly allowed jury to consider evidence of plaintiff's failure to exercise due care by riding with intoxicated driver); *Micallef v. Miehle Co.*, 348 N.E.2d 571, 577 (N.Y. 1976) (recognizing that unintended but reasonably foreseeable use is relevant to comparative fault). For a detailed discussion of pure comparative fault statutes and their operation, see 3 AMERICAN LAW OF PRODUCTS LIABILITY §§ 40:31-40:45 (1992).

76. See COLO. REV. STAT. § 13-21-111(1) (1980 & Supp. 1988). The plaintiff's fault must not be greater than the combined fault of parties as well as non-parties before determining whether plaintiff in a negligence action is entitled to recover. See, e.g., COLO. REV. STAT. § 13-21-111.5(3)(a) (1990); *Wong v. Sharp*, 734 F. Supp. 943, 944-45 (D. Colo. 1990) (interpreting statute to require court to combine negligence of non-party defendant and defendant in determining plaintiff's recovery).

77. COLO. REV. STAT. § 13-21-406(4) (1990).

The comparative fault statute enacted in Colorado for products liability actions requires a comparison of "fault of the person suffering the harm."⁷⁸ The statute does not indicate to what the "fault" should be compared. The assumption has been that the fault of the person suffering the harm is to be compared to the "fault" of the other parties to the action.⁷⁹ Because of the long-standing principle that only the plaintiff's assumption of risk⁸⁰ could influence recovery, there has been some question about the scope of the new statute.

In *Huffman v. Caterpillar Tractor Co.*⁸¹ and *Carter v. Unit Rig & Equipment Co.*⁸², the United States Court of Appeals for the Tenth Circuit concluded that the use of the term "fault" in the Colorado statute was actually broader than the term "negligence." Thus, the term "fault" encompassed all forms of plaintiff conduct, including ordinary contributory negligence, which had not previously been relevant in a products liability action.⁸³ In *Huffman*, the Tenth Circuit concluded that "fault" was not restricted to the categories of assumption of the risk and product misuse.⁸⁴ Consequently, plain-

78. *Id.* § 13-21-406(1); see also *Perlmutter v. United States Gypsum Co.*, 4 F.3d 864, 874 (10th Cir. 1993) (stating that intent of Colorado comparative fault statute is to permit trier of fact to consider fault in arriving at damage award rather than addressing issue of liability); *Welch v. F.R. Stokes, Inc.*, 555 F. Supp. 1054, 1055 (D. Colo. 1983) (explaining that use of comparative fault statute relates only to damages and not to liability).

79. COLO. REV. STAT. § 13-21-406(1).

80. For further discussion of assumption of the risk, see *supra* notes 59-60 and accompanying text. In addition, it has been said that unforeseeable product misuse is, under the current and former scheme, a complete defense as well. *States v. R.D. Werner Co.*, 799 P.2d 427, 429 (Colo. Ct. App. 1990) (citing RESTATEMENT (SECOND) OF TORTS § 402A cmt. h) (1965)).

81. 908 F.2d 1470 (10th Cir. 1990).

82. *Id.* at 1483.

83. *Huffman*, 908 F.2d at 1476-77; *Carter*, 908 F.2d at 1486-87; see also, *FDIC v. Clark*, 768 F. Supp. 1402, 1409 (D. Colo. 1989) (barring recovery under contributory negligence theory if plaintiff's fault is greater than that of all defendants combined), *aff'd* 978 F.2d 1541 (10th Cir. 1992).

84. *Huffman*, 908 F.2d at 1477. The court surveyed the Colorado legislative history, which includes tape recordings of the legislative sessions. *Id.* In those recordings, the court found no indication that the status quo of available defenses was to be retained. Instead, the court found that the breadth of the word "fault" and the sponsor of the bill's commitment to comparing the "responsibilities of persons suffering or causing harm," indicated a more expansive reading of the types of conduct that were now to affect a plaintiff's recovery. *Id.* at 1476-77. Similarly, in *Carter*, the court found no indication that the legislature intended to exempt contributory negligence from the operation of the statute. *Carter*, 908 F.2d at 1486-87.

In *Huffman*, the plaintiff's decedent was killed while operating a pipelayer manufactured by the defendant, which was found to be defective for its inadequate braking system. *Huffman*, 908 F.2d at 1471-73. The decedent's death resulted while he was attempting to operate the defective braking system. Plaintiff's dece-

tiff conduct unrelated to the defective product created, distributed or sold by the defendant will reduce or bar recovery, in spite of the product's failure.

The extent of the shift in focus away from the product to the plaintiff's conduct, perhaps totally unrelated to the product, can be seen in *States v. R.D. Werner Co.*⁸⁵ In *Werner*, the plaintiff improperly set up an aluminum ladder manufactured by the defendant so that the front feet were six to nine inches above the rear feet.⁸⁶ The plaintiff subsequently fell off the ladder when it shifted away from him and down the incline on which it had been improperly set. The plaintiff alleged that there was a defect in the rivets that attached the spreader bars between the front and rear legs.⁸⁷ The jury found for the defendant on an instruction that allowed them to consider the plaintiff's misuse of the product as the sole cause of his injury, thereby relieving the defendant from liability even if the product was found to be defective.⁸⁸

The Court of Appeals in *Werner* found the instruction to be proper even though once a product is established as defective, both the product and the plaintiff's misuse may be considered causes. In such event, the plaintiff's recovery is reduced accordingly, but not barred, if the misuse was foreseeable.⁸⁹ There is no indication

dent was found to be 50% at fault for his operation of the pipelayer at the time of the accident, and the damages were reduced accordingly. *Id.* at 1471-72. It is not known on what specific facts the jury based its decision. From the facts of the case, it does not appear that the decedent assumed the risk, nor had knowledge of the inadequate braking system. In fact, plaintiff was apparently using the product in one of the ways it was intended to be used.

85. 799 P.2d 427 (Colo. Ct. App. 1990).

86. *Id.* at 428. The ladder's labeling indicated that this was an improper and unsafe positioning of the ladder. *Id.*

87. *Id.* at 429. The plaintiff did not allege a failure to warn, but rather, that the rivets did not properly secure the spreader bars to the front and rear legs, causing a weakness in the ladder when in use. *Id.*

88. *Id.* at 429-30. The court conceded that the concept of product misuse provided a complete defense only if the misuse was unforeseeable and unintended. In such cases, the misuse, and not the defect, would be the cause of injury. *Id.* at 429 (relying on comment h of Restatement (Second) of Torts § 402A).

89. *States v. R.D. Werner, Co.*, 799 P.2d at 427, 430 (Colo. Ct. App. 1990). The court did not specifically discuss the foreseeability of this use of the ladder. If a warning is provided about proper installation, however, then clearly the misuse is foreseeable. The court also failed to mention the intended use of the product; using a ladder as a stepping mechanism is obviously the product's intended use. The court simply concluded that the jury should be allowed to determine whether the misuse was the sole proximate cause of the injury. The opinion is woefully inadequate in explaining how the jury instruction could be proper, and not misleading, without providing any explanation of foreseeability of product use and its relation to the effect of the plaintiff's conduct on his recovery. See *Armentrout v. FMC Corp.*, 819 P.2d 522, 526-27 (Colo. Ct. App. 1991) (stating that if misuse is sole cause, no recovery is permitted even if defect exists; misuse instruction should

that the jury was informed that it could reduce plaintiff's recovery and not bar it, even though the comparative fault statute allows this result.

It appears that in Colorado the formerly narrow categories of plaintiff conduct that would bar recovery—those directly related to the product and its defective condition—are now broadly defined to prevent recovery. Further, it is not just the broad definition of relevant plaintiff conduct that is troublesome but its effect. The focus on plaintiff conduct prevents the accurate comparison of like responsibilities, shifting the focus away from the defendant's lack of responsibility over its products to the plaintiff's lack of responsibility in the use of the product.

3. *Ohio*

The Ohio Supreme Court in *Bowling v. Heil Co.*⁹⁰ followed the suggestion of the Restatement (Second) of Torts, section 402A, and held that the only defenses based on plaintiff fault available in strict products liability actions are assumption of risk and unforeseeable product misuse.⁹¹ Simple negligence in failing to discover the defect or to guard against its existence is not a defense.⁹² Assumption of risk and unforeseeable misuse, however, are complete defenses; Ohio's comparative negligence statute at the time did not apply to strict liability actions to reduce plaintiff's recovery.⁹³

The tension between the effect of comparative fault principles and strict, non-fault based products liability is demonstrated in *Bow-*

be given only if defendant could not foresee possibility of misuse), *rev'd in part, aff'd in part*, 842 P.2d 175 (Colo. 1992); *cf.* *Patterson v. Magna Am. Corp.*, 754 P.2d 1385, 1386-87 (Colo. Ct. App. 1988) (finding misuse instruction improper because circular saw was used in intended manner and plaintiff's placing of his hand under the workbench to make adjustment was not misuse as a matter of law).

The court in *R.D. Werner* also did not refer to nor reconcile its holding with that in *Patterson*. It seems difficult for courts and juries to allow plaintiffs to recover when they have done something that in hindsight seems irresponsible, even though the defective product is just as likely to kill, maim or injure the careful and overly cautious plaintiff.

90. 511 N.E.2d 373 (Ohio 1987).

91. *Id.* at 377. For the language of section 402A, comment n of the Restatement (Second) of Torts, see *supra* note 38.

92. *Bowling*, 511 N.E.2d at 378.

93. *Id.* at 375; *see also* *Onderko v. Richmond Mfg. Co.*, 511 N.E.2d 388, 391 (Ohio 1987) (holding that assumption of risk bars recovery). The plaintiff in *Bowling* was found 30% at fault for placing himself in between the bed of the dump truck and its chassis, trying to adjust the hydraulic pressure and thus being crushed when the bed came crashing down on him in the middle of his attempt to fix the truck. *Bowling*, 511 N.E.2d at 374. The plaintiff's conduct, not amounting to a voluntary and unreasonable assumption of the risk, thus did not bar nor reduce his recovery. Plaintiff recovered in full. *Id.* at 380.

ling. The *Bowling* court decided to follow the Restatement, as had other jurisdictions that felt the policy reasons behind strict liability prevented the application of fault principles as a means of reducing plaintiff's recovery.⁹⁴ The Ohio Legislature partially ignored these policies in "reforming" the applicability of *Bowling* when it enacted Ohio's products liability statute in 1988.⁹⁵ This statute follows the *Bowling* conclusion that assumption of the risk is a complete defense in all products liability suits.⁹⁶ The legislature, however, ex-

94. *Bowling*, 511 N.E.2d at 378-79. The court relies in part on comment c to Restatement section 402A which identifies the special responsibility that product manufacturers have toward members of the consuming public. The risk-bearing theory, which alleges that the manufacturers are better able to bear the financial risks of and losses from their defective products, serves as the primary basis for strict liability. *Id.* at 379. Any attempt to distribute blame on a fault basis would fly in the face of those principles. *Id.*

There is considerable debate over the applicability of comparative fault principles in strict liability, but most jurisdictions have decided that fault comparison is appropriate, often on a causation basis and not a true fault basis. See, e.g., *Murray v. Fairbanks Morse*, 610 F.2d 149, 159-60 (3d Cir. 1979) (observing that "the comparison itself must focus on the role each played in bringing about the particular injury"); *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129, 1139 (9th Cir. 1977) (holding defendant strictly liable for harm caused by defective product, but reducing award in proportion to plaintiff's contribution to injury); *Daly v. General Motors Corp.*, 575 P.2d 1162, 1168-69 (Cal. 1978) (holding that recovery will be reduced only to extent of plaintiff's own lack of care in causing injury); *Powers v. Hunt-Wesson Foods, Inc.*, 219 N.W.2d 393, 395 (Wis. 1974) (holding that defense of comparative negligence is available to determine apportionment of fault in case involving manufacture of allegedly defective product). This was the conclusion of the drafters of the Uniform Comparative Fault Act. See UCFA § 1(b), 12 U.L.A. 44 (1977); see also David A. Fischer, *Products Liability—Applicability of Comparative Negligence*, 43 Mo. L. Rev. 431, 450 (1978) (reasoning that comparative causation is unsatisfactory in strict liability, but acknowledging that plaintiff's recovery would be reduced according to plaintiff's fault as compared to conduct of hypothetical reasonable person); Todd P. Leff & Joseph V. Pinto, *Comparative Negligence in Strict Products Liability: The Courts Render the Final Judgment*, 89 Dick. L. Rev. 915, 930-32 (1985) (examining practical considerations of applying comparative negligence to strict liability); Dix W. Noel, *Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk*, 25 VAND. L. REV. 93 (1972) (providing general discussion of different theories for reducing or barring plaintiff recovery in strict liability actions); Twerski, *supra* note 43, at 331 (suggesting use of comparative fault in place of contributory negligence so as not to bar plaintiff recovery); Wade, *supra* note 43, at 374 (discussing comparative causation under UCFA as preferable to common law doctrines).

95. OHIO REV. CODE ANN. § 2315.20 (Anderson 1988).

96. *Id.* § 2315.20(B)(2). Ohio courts have held similarly. See *Cincinnati Ins. Co. v. Volkswagen of America, Inc.*, 535 N.E.2d 701, 707-08 (Ohio Ct. App. 1987) (holding that comparative and contributory negligence are not valid defenses to product liability actions based on strict liability, although assumption of risk remains viable defense); accord *Krosky v. Ohio Edison Co.*, 484 N.E.2d 704, 707-09 (Ohio Ct. App. 1984) (holding comparative negligence not applicable under theory of strict liability, while assumption of risk is viable defense); *Robinson v. Parker-Hannifin Corp.*, 444 N.E.2d 1084, 1086 (Ohio Com. Pl. 1982) (holding that neither comparative nor contributory negligence are allowable defenses).

panded the defenses available in actions against a supplier (but not a manufacturer),⁹⁷ adding contributory negligence as a defense.⁹⁸ This compromise position appears to deal with one of the primary concerns of tort reformers—the unfairness of strict liability against parties who did not have any relationship to the product other than distributing it.⁹⁹ The defenses based on plaintiff conduct remain virtually identical after reform. The Ohio Legislature appears to have dealt with liability reduction in a manner that is in fact related to liability rules and not remedial measures designed to reduce damages or unnecessarily focus on plaintiff conduct.

An interesting byproduct of the new Ohio statute is that plaintiffs now have an opportunity to recover despite their assumption of the risk: Plaintiffs can recover from suppliers against whom they can prove negligence so long as their fault does not exceed that of the suppliers.¹⁰⁰ Recovery against the product manufacturer will be barred, however, if assumption of the risk is indeed proven. This putative attempt to protect product suppliers from strict liability, however, may have increased their liability because plaintiffs may more frequently name suppliers and proceed on a negligence action against them.¹⁰¹ As such, the purpose of strict liability does

97. The term "supplier" is expansively defined in the Ohio statute as virtually any entity other than a product manufacturer, including distributors, packagers, wholesalers, retailers, lessors, etc. OHIO REV. CODE ANN. § 2307.71 (Anderson 1988).

98. *Id.* § 2315.20(C)(2). Contributory negligence may only be asserted by a supplier, however, when the product manufacturer is unavailable to the plaintiff for suit for any of the reasons identified in the Ohio statute. *Id.* § 2307.78 (Anderson 1992). One such reason is not being subject to service of process. Further, the supplier may only be sued in negligence; strict liability is not applicable.

Presumably, because the action against a supplier is in negligence, the comparative negligence statute applies in any action against a supplier, including use of assumption of risk. See *Anderson v. Ceccardi*, 451 N.E.2d 780, 782-83 (Ohio 1983) (finding defense of assumption of risk to be merged with contributory negligence under § 2315.19); accord *Hirschbach v. Cincinnati Gas & Elec. Co.*, 452 N.E.2d 326, 329-30 (Ohio 1983). Ohio's comparative negligence statute provides that contributory negligence or assumption of risk is not a bar to recovery. However, recovery is permitted only if plaintiff's fault is no greater than the combined fault of all other persons from whom the plaintiff seeks recovery. OHIO REV. CODE ANN. § 2315.19 (A)(2) (Anderson 1991). Plaintiff recovers if he or she is 50% or less at fault in actions based on negligence. See *Bailey v. V & O Press Co., Inc.*, 770 F.2d 601, 605-06 (6th Cir. 1985) (stating that comparative negligence statute on its face is limited to negligence actions and does not apply to strict liability); *Stearns v. Johns-Manville Sales Corp.*, 770 F.2d 599 (6th Cir. 1985) (holding that comparative negligence statute does not apply in action based on strict liability).

99. Many jurisdictions have enacted similar provisions in recent years. See *Sanders & Joyce*, *supra* note 3, at 217-23.

100. OHIO REV. CODE ANN. §§ 2315.20(3), 2315.19(A)(2) (Anderson 1991). For further discussion of this statute, see *supra* notes 95-98 and accompanying text.

101. See *Wint v. Fark*, 1993 WL 46376 (Ohio Ct. App., Feb. 19, 1993). In *Wint*,

seem defeated in this instance. One of the primary benefits of strict liability, particularly regarding design and manufacturing defects, is the ability to get to the supplier without bearing the difficulty of proving negligence.

The Ohio definition of assumption of the risk seems to strike an appropriate balance between the defendant's responsibility to properly manufacture products and the plaintiff's responsibility to protect him or herself. For example, assumption of the risk in Ohio requires three elements: (1) full knowledge of the condition of the product; (2) the condition is patently dangerous and (3) the plaintiff nonetheless voluntarily exposed himself to it.¹⁰² These factors equally emphasize defendant's and plaintiff's responsibility by allowing consideration of the plaintiff's conduct only when the plaintiff and the defendant share the same knowledge about the defective condition of the product.¹⁰³

4. *Comparative Responsibility—Texas and the MUPLA*

Some jurisdictions, like Texas, have a variation of comparative fault that they call comparative responsibility.¹⁰⁴ I mention these jurisdictions to distinguish them because they do not consider re-

the plaintiff, injured while riding with an intoxicated driver, sought to overturn the grant of summary judgment in favor of Guardian corporations, which allegedly installed, manufactured or designed the truck's alcohol interlock system. *Id.* at *3. The plaintiff had brought a products liability claim and Guardian asserted assumption of the risk as an affirmative defense. If Guardian was a manufacturer, assumption of risk could act as a complete bar to recovery under section 2315.20. Plaintiff, however, contended that their status as suppliers under § 2315.20 required application of comparative fault principles, and he, thus, could not be barred from recovery even though he may have assumed the risk. *Id.* Although the Guardian defendants may technically have fallen under the statutory definition of supplier, the court upheld the grant of summary judgment because there was no causal connection between the status of the alcohol interlock system installed by Guardian and the plaintiff's injuries. *Id.*

102. Assumption of the risk in Ohio has a judicially created definition. See *Sech v. Rogers*, 453 N.E.2d 705, 709 (Ohio 1983) (stating three elements of assumption of risk); see also *Iannelli v. AMF Inc.*, 1992 WL 236,768, at *1 (Ohio Ct. App. Sept. 23, 1992) (citing *Sech v. Rogers*, 453 N.E.2d 705, 709 (Ohio 1983); *Briere v. Lathrop Co.*, 258 N.E.2d 597, 603 (Ohio 1970)).

103. For a discussion of the Ohio method as a model for the appropriate balance of responsibilities in products liability, see *supra* notes 90-102 and accompanying text.

104. TEX. CIV. PRAC. & REM. CODE ANN. § 33 (West 1994). The Texas statute is called "Comparative Responsibility." See *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 5 (Tex. 1992) (noting that enactment of § 33.001 was intended to merge comparative negligence principles of statute with holdings in *Duncan v. Cessna Aircraft*); *Webster v. Lipsey*, 787 S.W.2d 631 (Tex. Ct. App. 1990) (holding that negligent defendants should not be separated from strictly liable defendants with § 33.001 being then applied to negligent defendants). Idaho also calls its comparative fault scheme one of "comparative responsibility." IDAHO CODE § 6-1304

sponsibility at all. These jurisdictions neither promote responsibility nor do they actually compare it in any meaningful sense. Instead, insightful legislators, who wished to play to the audience of tort reformers, simply called their comparative fault schemes "responsibility" schemes for effect. These schemes, in fact, do no more nor less than any other comparative fault scheme described above.

In fact, the Texas scheme, which specifically requires a comparison of responsibility,¹⁰⁵ never defines comparative responsibility. Instead, it directs the trier of fact to attribute responsibility with regard to negligent acts or omissions, defective or unreasonably dangerous products or "other conduct or activity violative of the applicable legal standard."¹⁰⁶ Of course, conduct violative of an applicable legal standard is a breach of a legally defined responsibility, but that is not the whole answer, nor should it be. Under the Texas scheme, no comparison is made between the failed responsibility and the person to whom the responsibility was owed. The Texas scheme also fails to compare the failed responsibility with the timing of the conduct or severity of the conduct. In the final analysis,

(1994); see also *Watson v. Navistar Int'l Transp. Corp.*, 827 P.2d 656, 673 (Idaho 1992) (adopting version of Uniform Comparative Fault Act).

105. TEX. CIV. PRAC. & REM. CODE ANN. § 33.001(a)-(b) (West 1994).

106. *Id.* § 33.011(4). The plaintiff may recover in a product liability action based on negligence only if his responsibility "is less than or equal to 50% of the cause of the injury." *Id.* § 33.001(a). In product actions based on strict liability, the plaintiff can recover if his responsibility is less than 60%. *Id.* § 33.001(b). This difference in percentage may have been a consolation prize to the plaintiff's bar that wanted to maintain the pure comparative fault approach that had been used since the Texas Supreme Court declared it so in *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex.), *rev'd on other grounds*, 665 S.W.2d 439 (Tex. 1984). In *Duncan*, the court stated that plaintiff's conduct is to be compared to defendant's, even in strict products liability, and damages reduced accordingly. *Duncan*, 665 S.W.2d at 428-29; see also *Stewart Title*, 822 S.W.2d at 5 (stating that enactment of Texas statute intended to merge comparative negligence principles with holdings in *Duncan*). For a discussion of the type of conduct which is relevant under comparative responsibility, see *Exxon Corp. v. Tidwell*, 816 S.W.2d 455, 469 (Tex. Ct. App. 1991) (including assumption of risk under comparative responsibility) and *Connell v. Payne*, 814 S.W.2d 486, 488 (Tex. Ct. App. 1991) (determining reasonableness of actor's conduct in confronting a risk using comparative responsibility principles).

The Texas reform of a pure comparative fault approach is similar to the reform that occurred in Colorado and Illinois. For a discussion of the reform in these states, see *supra* notes 54-89 and accompanying text. Texas has some notoriously pro-plaintiff jurisdictions, particularly those where many of the asbestos-related injury cases have been tried. The first asbestos injury case that succeeded was tried in the United States District Court for the Eastern District of Texas, and affirmed by the Fifth Circuit. See *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). I am sure that part of the impetus in these jurisdictions toward reform has been the extreme pro-plaintiff reputation that these jurisdictions garnered in the late 1970s and early 1980s.

no method is applied that takes the circumstances of the parties and their relationship to one another into account.

The Model Uniform Product Liability Act (MUPLA), promulgated in the late 1970s by the United States Department of Commerce, attempted to provide some of the certainty for which product manufacturers and other potential defendants clamored.¹⁰⁷ In the process, the Department of Commerce included a proposed comparative responsibility section. Like the Texas statute described above, this proposal would simply reduce liability by considering any type of plaintiff conduct that a jury could conceivably find unreasonable.¹⁰⁸ For example, most comparative fault schemes exclude from consideration a plaintiff's failure to inspect for or discover a defect.¹⁰⁹ The MUPLA, however,

107. Model Uniform Product Liability Act (MUPLA), 44 Fed. Reg. 62,714 (1979). MUPLA specifically identified the problems associated with the effort to create uniform product liability doctrine. Section 101, "Findings," states:

(A) Sharply rising product liability insurance premiums have created serious problems in commerce resulting in:

(1) Increased prices of consumer and industrial products; (2) Disincentives for innovation and for the development of high-risk but potentially beneficial products; (3) An increase in the number of product sellers attempting to do business without product liability insurance . . . ; and (4) Legislative initiatives enacted in a crisis atmosphere that may, as a result, unreasonably curtail the rights of product liability claimants.

(B) One cause of these problems is that product liability law is fraught with uncertainty and sometimes reflects an imbalanced consideration of the interests it affects. The rules vary from jurisdiction to jurisdiction and are subject to rapid and substantial change. These facts militate against predictability of litigation outcome.

(C) Insurers have cited this uncertainty and imbalance as justifications for setting rates and premiums that, in fact, may not reflect actual product risk or liability losses

(E) Uncertainty in product liability law and litigation outcome has added to litigation costs and may put an additional strain on the judicial system.

(F) Recently enacted state product liability legislation has widened existing disparities in the law

Id. § 101. The Act clearly "seeks substantive changes that favor the business community." HENDERSON & TWERSKI, *supra* note 67, at 745.

108. For further discussion of the Texas statute, see *supra* notes 104-06 and accompanying text.

109. See, e.g., *Coney v. J.L.G. Indus. Inc.*, 454 N.E.2d 197, 203-04 (Ill. 1983) (holding that consumer's failure to discover or guard against defect should not be compared to reduce damages); *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140, 144 (N.J. 1979) (holding plaintiff negligence unavailable as defense when it consists merely of failure to discover product defect); accord RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1964); 3 AMERICAN LAW OF PRODUCTS LIABILITY § 40:12 (3d ed. 1992). But see *Bradshaw v. Freightliner Corp.*, 937 F.2d 197, 203-04 (5th Cir. 1991) (failing to discover defect under new Texas comparative responsibility statute may reduce plaintiff's recovery); *Hernandez v. American Appliance Mfg. Corp.*, 827 S.W.2d 383, 391-92 (Tex. Ct. App. 1992) (finding plaintiff need not have knowledge of risk of particular defect to be contributorily negligent).

provides that when the seller proves by a preponderance of the evidence that the injury resulted from a defect a reasonable person could have found without an inspection, the claimant's recovery is reduced.¹¹⁰ The MUPLA requires the trier of fact to determine percentages of responsibility by considering both the nature of the alleged conduct of each responsible party and the extent to which the alleged conduct proximately caused the damages claimed.¹¹¹ The MUPLA language mirrors the Uniform Comparative Fault Act,¹¹² but does not provide any meaningful explanation of how the required determination is to be made.

C. *Comparing Causation*

Much has been said about whether victim fault should be considered as a matter of causation.¹¹³ When the defendant's liability is based on strict liability, however, any examination of victim fault will result in an inadequate comparison of the defendant's "fault" with that of the victim. This leaves causation as the only other avenue of comparison.¹¹⁴ As such, courts that have been hesitant to compare fault and no-fault in products liability cases have often turned to comparing a combination of conduct and causation.¹¹⁵

110. MUPLA, *supra* note 108, § 112(A)(2). This seems to incorporate the "open and obvious danger" that prevented recovery for injuries that resulted from obvious defects. Most jurisdictions abrogated this rule in the late 1970s because it would discourage manufacturers from correcting obvious defects. See *Campo v. Scofield*, 95 N.E.2d 802, 804 (N.Y. 1950) (holding that a manufacturer is not liable for "obvious and patent" danger or defect), *overruled by Micallef v. Miehle Co.*, 348 N.E.2d 571 (N.Y. 1976).

111. MUPLA, *supra* note 108, § 111(B)(3). This is similar to the UCFA. UCFA § 2(b), 12 U.L.A. 44 (1977). Both the UCFA and the MUPLA call for a pure comparative fault scheme. UCFA, *supra* § 1; MUPLA *supra* note 107, § 111(A).

112. For further discussion of UCFA, see *supra* notes 40-43 and accompanying text.

113. For further discussion of early common law reliance on causation as a basis for contributory negligence, see *supra* notes 28-34 and accompanying text. For a history of the Roman, French and EC consideration of causation, see *infra* notes 123-36 & 180-91 and accompanying text.

114. For a discussion of the consideration of causation as an alternative to comparing fault under the UCFA, see *supra* notes 41-43 and accompanying text. For a discussion of the general difficulty of applying comparative fault principles to strict liability, see Mark E. Roszkowski & Robert A. Prentice, *Reconciling Comparative Negligence and Strict Liability: A Public Policy Analysis*, 33 St. Louis U. L.J. 19 (1988).

115. See, e.g., *Murray v. Fairbanks Morse*, 610 F.2d 149, 159 (3d Cir. 1979) ("Although we may term a defective product 'faulty' it is qualitatively different from the plaintiff's conduct that contributes to his injury. A comparison of the two is therefore inappropriate."); *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129, 1139 (9th Cir. 1977) (finding comparative causation "a conceptually more precise term than 'comparative fault' since fault alone without causation does not subject one to liability").

Simply refusing to consider a victim's conduct rightfully makes courts uneasy. Consequently, these courts struggle with the concept of comparing something that cannot be compared.¹¹⁶ As a result, they may analogize strict liability to negligence per se,¹¹⁷ or conclude that strict products liability is really a version of fault that provides appropriate basis for comparison.¹¹⁸

It does not appear to me that causation can be compared; not if the lessons of cause-in-fact causation mean anything.¹¹⁹ Even if causation can be compared, it is pointless to compare causation in products liability cases where the relevant issue for comparison focuses on who bears the responsibility. Manufacturing defect cases are the only cases where the liability is truly strict and not fault-based. Under such strict liability, victim fault should be irrelevant,

116. See *Murray*, 610 F.2d at 159. In *Murray*, the Third Circuit explained the difficulty of this comparison:

The substitution of the term fault for defect, however, would not appear to aid the trier of fact in apportioning damages between the defect and the conduct of the plaintiff. The key conceptual distinctions between strict products liability theory and negligence is that the plaintiff need not prove faulty conduct on the part of the defendant in order to recover. The jury is not asked to determine if the defendant deviated from the standard of care in producing his product. There is no proven faulty conduct of the defendant to compare with the faulty conduct of the plaintiff in order to apportion the responsibility for an accident. Although we may term a defective product "faulty," it is qualitatively different from the plaintiff's conduct that contributes to his injury. A comparison of the two is therefore inappropriate.

Id. (emphasis in original).

117. See, e.g., *Dippel v. Sciano*, 155 N.W.2d 55, 64-65 (Wis. 1967) (finding theoretical similarities between strict liability and negligence per se).

118. See, e.g., *Daly v. General Motors Corp.*, 575 P.2d 1162, 1172 (Cal. 1978) (extending comparative fault to actions founded on strict liability "because it is fair to do so"); see also Wade, *supra* note 43, at 377 (stating that in products liability, the fault inheres in the product defect).

119. See Ray J. Aiken, *Proportioning Comparative Negligence—Problems of Theory and Special Verdict Formulation*, 53 MARQ. L. REV. 293, 294-97 (1970) (discussing theoretical problems in assessing degrees of fault); Fischer, *supra* note 94, at 445-47 (addressing difficulties in making causal comparisons); Sobelsohn, *supra* note 21, at 428 (reasoning that comparative causation does not yield intelligible basis for deriving relative fault percentages); William E. Westerbeke & Hal D. Meltzer, *Comparative Fault and Strict Products Liability in Kansas: Reflections on the Distinction Between Initial Liability and Ultimate Loss Allocation*, 28 KAN. L. REV. 25, 77-83 (1979) (discussing difficulties of attributing fault with causal comparisons); Jeffrey M. Goldsmith, Comment, *Comparative Negligence and Strict Products Liability: Butaud v. Suburban Marine & Sporting Goods, Inc.*, 38 OHIO ST. L.J. 883, 896-900 (1977) (discussing difficulties of comparative causation analysis in context of strict products liability); Mark E. Wilkey, Comment, *Mulherin v. Ingersoll: Utah Adopts Comparative Principles in Strict Products Liability Cases*, 1982 UTAH L. REV. 461, 468-71 (1982) (reasoning that causal comparisons are ineffective under analyses using either cause in fact or proximate cause). But see Robert N. Strassfeld, *Causal Comparisons*, 60 FORDHAM L. REV. 913 (1992).

unless the victim specifically knows of the defect and still proceeds.¹²⁰ In such cases, the risk distribution and compensation goals of strict liability are at their most forceful.¹²¹ In warning and design defect cases, liability focuses on conduct. Even in jurisdictions that insist on calling it strict liability, the jury obviously must evaluate the manufacturer's conduct in making either design or warning decisions in order to impose liability. In that event, there is no reason the jury cannot also identify the persons to whom the institutional defendant owes its obligations and to measure the failure of those obligations accordingly.¹²²

IV. THE HISTORICAL EUROPEAN EXPERIENCE WITH VICTIM FAULT

The American treatment of victim fault, which is complicated and confusing, may be contrasted with the European system, which was born in the laws of Emperor Justinian and evolved through the Civil Codes of post-revolutionary Europe.¹²³ Studying the Roman treatment of victim fault is an important first step to gaining a full appreciation of how the victim has fared over the centuries. It may also help us understand our own system better.¹²⁴

120. For further discussion of assumption of risk, see *infra* notes 257-60 and accompanying text.

121. For further discussion of the goals of strict liability, see Davis, *supra* note 2, at 1227-35.

122. If comparative fault is to focus on the plaintiff's conduct, it is only fair that the defendant's conduct, and not the inhuman product, be evaluated also. See Aaron Gershonowitz, *What Must Cause Injury in Products Liability?*, 62 IND. L.J. 701, 728-29 (1987) (removing seller fault from plaintiffs burden in defect issue and retaining it as defense means that many plaintiffs will still be unable to recover due to inability to show defendant's culpability).

123. There has been a great deal written on the civil law; its foundation in Roman law and its development during through the civilizations of Europe, particularly those of the French and Germans. For an introduction to the civil law, see JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (2d ed. 1985); ARTHUR T. VON MEHREN & JAMES R. GORDLEY, *THE CIVIL LAW SYSTEM* 3-14 (2d ed. 1977).

The use of comparative law as a means to enlighten the understanding of our own system of law and its components is widespread. In this increasingly small world, it seems only fitting to determine how our system of relating to one another compares with the ways in which other societies organize their relationships and the obligations which arise from them. Since the mid-nineteenth century, prominent legal scholars have looked to the historical foundations of the civil law for a clearer understanding of our own laws. See generally ROSCOE POUND, *READINGS IN ROMAN LAW AND THE CIVIL LAW AND MODERN CODES AS DEVELOPMENTS THEREOF* (1916) (enumerating various provisions of the Roman law as well as modern codes); Roscoe Pound, *The Influence of French Law in America*, 3 ILL. L. REV. 354 (1909) (discussing growth and eventual decline of French civil law in our society). For an excellent treatment of the history of comparative law, see 1 ZWIEGERT & KOTZ, *supra* note 18, at ch. 4.

124. The complete story of the impact of Roman law from the time of Justin-

A. *The Roman Law of Civil Obligations*

The Roman law of civil obligations is found primarily in the *Corpus juris civilis*, the codification of laws under Emperor Justinian's rule.¹²⁵ The *Corpus juris* dealt with civil, non-contractual obligations in the Lex Aquilia, "a piece of legislation which, with its extensions, provided the most general and important delictual remedy available in Roman law."¹²⁶ The law of delict, or wrongs, attached liability to acts done "without right" that resulted in harm.¹²⁷

ian's *Corpus juris civilis* is beyond the scope of this article. As explained in 1 F. H. LAWSON & B. S. MARKESINIS, *TORTIOUS LIABILITY FOR UNINTENTIONAL HARM IN THE COMMON LAW AND THE CIVIL LAW* (1982):

The student who has acquired reasonable knowledge of Roman law has made a necessary step towards understanding the modern Civil law; but he has still far to go for two reasons. First, the modern Roman law contained in the Civil law is not always the same as the old law in the books of Justinian. Secondly, it is important to realise that the Civil law systems are hybrids and contain many elements which, though sometimes influenced and modified by Roman law, are not essentially of Roman origin.

Id. at 36-37. For a discussion of the insights to be derived from discovering areas of uniformity and variety in tort laws, see Saul Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 61 TUL. L. REV. 235 (1986).

125. Emperor Justinian ordered the great compilation and systematization of Roman law in 528 A.D. See VON MEHREN & GORDLEY, *supra* note 124, at 6. This first "codification" of the law included the Institutes—a systematic treatise intended for students; the Digest—a compilation of the writings of the great Roman jurists; the Code—a collection of Roman enactments; and the Novels—the imperial legislation enacted after the Code and the Digest were completed. *Id.* The Digests are by far the most important element of the *Corpus juris civilis* because of their explanation of the classical law of the Code. *Id.* For a general discussion of the history of the *Corpus juris civilis* and its influence on modern civil law, see MERRYMAN, *supra* note 123, at 6-13.

For treatment of the *Corpus juris civilis* provisions on civil obligations, see BRUCE W. FRIER, *A CASEBOOK ON THE ROMAN LAW OF DELICT* (1989); REINHARD ZIMMERMAN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* (1990). For general treatment of Roman law, see WILLIAM W. BUCKLAND, *THE MAIN INSTITUTIONS OF ROMAN PRIVATE LAW* (1931); F. H. LAWSON, *A ROMAN LAW READER* (1969); PETER STEIN, *THE CHARACTER AND INFLUENCE OF ROMAN CIVIL LAW: HISTORICAL ESSAYS* (1988).

126. VON MEHREN & GORDLEY, *supra* note 124, at 567. The Lex Aquilia is considered the cornerstone for the law of torts. *Id.*

The *Corpus juris* classified the various delicts into four headings: *Furtum* or theft; *rapina* or theft with violence; *iniuria* or insult; and *damnum iniuria datum* or damage caused unlawfully. *Id.* The last of these was governed by the Lex Aquilia. *Id.* For further discussion of the Lex Aquilia, see FRIER, *supra* note 125, at 1-3; LAWSON & MARKESINIS, *supra* note 124, at 4-14. It has been said that delictual liability in Roman law had a punitive aspect based on the need for revenge against the wrongdoer—not unlike the early foundation of common law tort actions. For further discussion of the punitive aspect of delictual liability, see FRIER, *supra* note 125, at 1; VON MEHREN & GORDLEY, *supra* note 123, at 567; ZIMMERMAN, *supra* note 125, at 914.

127. DIG. 9.2.3-7 (C.H. Monro, ed. & trans., 1994 Reprint); see LAWSON & MARKESINIS, *supra* note 124, at 19 (explaining interpretation of "without right" in Lex Aquilia); VON MEHREN & GORDLEY, *supra* note 123, at 567 (same).

This approach to civil obligations is clearly analogous to common law tort liability based on fault. There is some question as to whether fault is the foundation of Roman delictual liability,¹²⁸ as it is partially in the common law tradition.¹²⁹ However, some level of wrongdoing, or culpa, is thought to have been required.¹³⁰

The Lex Aquilia is more a description of specific situations that have legal consequences than a set of rules of general application.¹³¹ This applies to the conduct of the plaintiff which may affect recovery as well as the acts to which liability attaches. Just as twentieth century defendants seek to blame the victim, the Romans commonly looked to the plaintiff's conduct (or the conduct of the plaintiff's slave)¹³² as a means of avoiding liability.

Several sections of the Lex Aquilia define circumstances in which a plaintiff's conduct may prevent recovery. It is unclear, however, whether victim fault or a causal principle operated to do so.¹³³ It appears that more often the plaintiff's conduct was not

128. See FRIER, *supra* note 125, at 30 (noting line drawn between obligation and no obligation to others is based on fault); LAWSON & MARKESINIS, *supra* note 124, at 19-30 (concluding that concept of fault was Roman invention); see also BUCKLAND, *supra* note 125, at 326-27 ("Roman classical law was not far removed from absolute application of the rule: no liability without fault.").

129. For further discussion of fault as the foundation of early common law liability, see Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981); Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641 (1989).

130. For a discussion of the degree of wrongdoing required to extend Roman delictual liability, see FRIER, *supra* note 125, at 30; LAWSON & MARKESINIS, *supra* note 124, at 22; ZIMMERMAN, *supra* note 125, at 90; Anita Bernstein, *L'Harmonie Dissonante: Strict Products Liability Attempted in the European Community*, 31 VA. J. INT'L L. 673, 697 (1991).

131. See ZIMMERMAN, *supra* note 125, at 913-14 ("Unlike the modern civilians, but very similar to the English common lawyers, the Roman jurists avoided generalizations and abstract definitions. . . . Their efforts did not culminate in a streamlined law of *delict* but remained a somewhat haphazard assemblage of individual *delicts*"); see also VON MEHREN & GORDLEY, *supra* note 123, at 567 (explaining Romans' use of strings of examples to define terms).

132. Justinian's *Corpus juris civilis* is filled with references to slave-holding and all the incidents of chattel-like quality that go along with the notion of humans as property. Most of the provisions dealing with contributory fault do so in this context. It is entirely possible that contributory fault was evaluated in its effect on the recovery of damage to property in determining the relative culpability of the parties. For a discussion of the range of references to slavery in the legal texts, see BUCKLAND, *supra* note 125, at 38-46.

133. The provisions of the Digest which describe victim fault and its effect are: DIG. 9.2.52.4 (Alfenus); DIG. 9.2.7.4 (Ulpianus); DIG. 9.2.9.4 (Ulpianus); DIG. 9.2.10 (Paulus); DIG. 9.2.11 (Ulpianus).

According to Lawson and Markesinis "[c]ulpa and causation compete for possession of the territory which Common lawyers recognise as that of contributory negligence." LAWSON & MARKESINIS, *supra* note 124, at 33. Similarly, it is unclear whether plaintiff's conduct, or its causal effect, was a total bar to recovery or not,

compared with or measured against the defendant's. Instead, plaintiff's conduct was deemed to be an intervening cause that prevented the defendant's conduct from being the *sine qua non* of the harm.¹³⁴ As such, both plaintiff and defendant could not have caused harm, thereby requiring an "all or nothing" conclusion. It is speculated that assumption of the risk may have been the foundation for evaluating the plaintiff's conduct,¹³⁵ more as a causal factor than as the predominant fault in the transaction. In that respect, the Roman approach was based on one of the principles of our own early common law approach.¹³⁶

but most commentators have concluded that the victim's conduct prevented recovery entirely. *Id.* For example, according to Lawson and Markesinis, "[w]e are not even told for certain that the whole of the damage was borne by one or other of the parties, though we may reasonably suppose that if the solution had been to share the damage we should have heard of it." *Id.*; see also ZIMMERMAN, *supra* note 125, at 1010 (describing Roman approach as one requiring all or nothing judgment of liability or no liability).

134. For a discussion of the difficulty in determining whether the Romans compared the plaintiff's conduct to the defendants or viewed it as a cause of his own harm, see LAWSON & MARKESINIS, *supra* note 124, at 33-34. Lawson and Markesinis describe in detail the debate among scholars about whether the Romans compared fault, an idea to which most commentators do not subscribe, or whether causation was the main inquiry, requiring an evaluation based on timing of the events and not their character. *Id.*

Digest 9.2.9.4 (Ulpianus) gives a prime example of the tension between fault and causation as the basis for the analysis:

But if, when persons were throwing javelins in sport, a slave was killed, the Aquilian action lies. However if, while others were throwing javelins in a field, the slave crossed through this area, the Aquilian action fails, since he ought not to have passed inopportunely through a field reserved for javelin-throwing. To be sure, if someone deliberately tossed a javelin at him, he will of course be liable in an Aquilian action.

DIG. 9.2.9.4 (Ulpianus). There appears to be some comparison of the hapless slave crossing the javelin-throwing field with the deliberate act of a javelin thrower. Upon closer look, however, the timing of the event seems at least equally as important, particularly when the javelin-throwers continue to play while the slave is crossing the area. The jurists did not clearly distinguish between the fault and causation approaches.

135. DIG. 9.2.11 (Ulpianus); DIG. 9.2.52.4 (Alfenus); DIG. 9.2.7.4 (Ulpianus). Each of these examples involves a slave who had some knowledge of the defendant's conduct and chose to continue in the face of it.

Of particular prominence is Digest 9.2.11 involving a barber, operating near a ball field, who while shaving a slave is hit in the arm with a ball and thus cuts the slave's throat. It states: "The person with whom the culpa lay is liable under the Lex Aquilia. Proculus (says) that the culpa lies with the barber; and indeed, if he was shaving at a place where games were normally played or where traffic was heavy, there is reason to fault him. But it would not be badly held that if someone entrusts himself to a barber who has a chair in a dangerous place, he should have himself to blame." DIG. 9.2.11 (Ulpianus). For a discussion of the approach taken to the barber case by the Roman jurists, see ZIMMERMAN, *supra* note 125, at 1011-12.

136. For a discussion of causation as a basis for common law treatment of plaintiff fault, see *supra* note 5 and accompanying text. For a further discussion of the treatment of causation, see BUCKLAND, *supra* note 125, at 334 (explaining Ro-

B. *Intellectual Heritage of the Modern Civil Codes*

The Roman system focused on remedies for specific transactions. It evolved through the Middle Ages to the Age of Enlightenment and finally to the nineteenth century Civil law system, which expressed a greater concern for rights and abstract generalizations of legal obligations.¹³⁷ Several forces drove the intellectual revolutions of the nineteenth century. Among those that played a significant role in defining personal obligations were secular natural law,¹³⁸ commitment to separation of governmental powers¹³⁹ and nationalism.¹⁴⁰

Commitment to the rights of the citizens and the creation of a state that served those rights stemmed from dissatisfaction with feudalism and aristocracy. This movement spawned the rebirth of an interest in the law as a means of correcting inequalities and re-

mans' treatment of plaintiff's conduct as issue of causation and not fault comparison).

137. See LAWSON & MARKESINIS, *supra* note 124, at 37-41 (tracing the development of Roman law to modern civil law). For a thorough explanation of the complexity of the civil law through its tendency towards generalization, see MERRYMAN, *supra* note 123, at 68-79 and VON MEHREN & GORDLEY, *supra* note 123, at 569-75, which discusses medieval development, the influence of Aristotle's *Nicomachean Ethics* and the natural law school of the seventeenth and eighteenth centuries. For a general discussion of the history of private law, see VAN CAENEGEM, *supra* note 18.

138. See MERRYMAN, *supra* note 123, at 14-15. Merryman credits secular natural law as one of the driving forces of the intellectual revolution which swept the Western nations at the turn of the nineteenth century, profoundly affecting the content of modern civil codes. An important corollary to secular natural law is the dedication to rationalism as the controlling factor of human conduct. Rationalism assumed that reason controlled human activities and that careful thought could resolve all disputes. *Id.* at 16-17; see also VON CAENEGEM, *supra* note 18, at 117-21 (identifying primary scholars of natural law and discussing their contributions). The first exponent of this school is Hugo Grotius, followed by the German scholar Samuel Pufendorf and the French author Jean Domat. *Id.* at 119-21.

139. See MERRYMAN, *supra* note 123, at 15 ("A second tenet of intellectual revolution was separation of governmental powers."). Dedication to separation of governmental powers is reflected in the effort to isolate the judiciary from any lawmaking role, which distinguishes the civil law countries from common law countries. *Id.* at 16. The French in particular distrusted the judiciary, most of whom were aristocrats and thus the target of the Revolution. *Id.* See generally VAN CAENEGEM, *supra* note 18, at 128-30 (discussing criticisms of pre-Revolutionary French court system); ZWIGERT & KOTZ, *supra* note 18, at 82-83 (tracing law of Revolutionary period and changes in governmental structure).

140. MERRYMAN, *supra* note 123, at 17-18. According to Merryman, "[n]ationalism was another aspect of the glorification of the state. The objective was a national legal system that would express national ideals and the unity of the nation's culture." *Id.*; see also VAN CAENEGEM, *supra* note 18, at 125-26 (promulgating national codes is essential element of policies of unification and protection of common good of citizenry).

forming the *ancien regime* in general.¹⁴¹ One author has summed up the period:

[T]he old world underwent a radical renewal, which was guided by the principles of human reason and by the aim of achieving the happiness of man. The achievement of this aim now seemed to demand that the burden of preceding centuries be cast down. Applied to law, this programme meant that the proliferation of legal rules must be sharply reduced, that the gradual development of law ought to be replaced with a plan of reform and a systematic approach, and finally that absolute authority ought to be claimed neither for traditional values such as Roman law, nor by the learned lawyers and judges who had appointed themselves 'oracles' of the law. Old customs and books of authority must be replaced by new law freely conceived by modern man, and whose sole directing principle was reason.¹⁴²

The effort focused primarily on modernizing legal methods. While the revolutionaries of the day spoke of replacing the "old customs," they were not true to their word when it came to rewriting the traditional rules. Instead, the governing systems were altered significantly but much of the substance of the Roman law of obligations was retained.¹⁴³

The work of the natural law lawyers culminated in the codification movement of the nineteenth century, and in particular with the French Code Civil in 1804. While the legal attitudes of the naturalists ultimately fell into disrepute,¹⁴⁴ the codifications were completed under their influence. As a result, the Codes, the French

141. See VAN CAENEGEM, *supra* note 18, at 115 (examining renewal of law in context of European Enlightenment); see also MERRYMAN, *supra* note 123, at 14 (stating that intellectual revolution that began in 1776 is main source of public law in civil law tradition). The historical literature on this period is vast and particular reference will be made to those works which deal with the evolution of legal principles and their codification.

142. VAN CAENEGEM, *supra* note 18, at 116-17 (footnotes omitted).

143. LAWSON & MARKESINIS, *supra* note 124, at 40-41; VAN CAENEGEM, *supra* note 18, at 121; VON MEHREN & GORDLEY, *supra* note 123, at 572-74. See generally Angelo Piero Sereni, *The Code and the Case Law*, in *THE CODE NAPOLEON AND THE COMMON LAW WORLD* 55, 57 (Bernard Schwartz ed., 1956) (noting that Code was meant to break with past law, even though many specific provisions were same as pre-existing legal rules); Andre Tunc, *The Grand Outlines of the Code*, in *THE CODE NAPOLEON AND THE COMMON LAW WORLD* 19, 40 (Bernard Schwartz ed., 1956).

144. See VAN CAENEGEM, *supra* note 18, at 139-41 (noting decline in popularity of natural law theory of liability); VON MEHREN & GORDLEY, *supra* note 123, at 575 (same).

Code in particular, flourished. The French Code acts as the basis for this discussion because of the profound effect it has had on the codes of other European countries.¹⁴⁵

C. *Delictual Liability in the Civil Codes*

The French Code contains only the most general provisions on delictual liability. In spite of its bare bones content, the French Code has served as the basis for almost every other civil code since its enactment.¹⁴⁶ Five provisions of the French Code contain the heart of delictual liability.¹⁴⁷ Foremost among them is Article 1382 which states: "Any human act which causes damage to another obligates the person through whose fault the damage occurred to make reparation for the damage."¹⁴⁸ Further, Article 1383 states: "Everyone is liable for damage he has caused not only by his act but also by his negligence or by his imprudence."¹⁴⁹ The provisions are

145. See 1 ZWIGERT & KOTZ, *supra* note 18, at 101-22 (chronicling the reception of the Code Civil in other countries).

146. LAWSON & MARKESINIS, *supra* note 124, at 41; see also VON MEHREN & GORDLEY, *supra* note 123, at 575 (recognizing that French Code has been incorporated into civil codes of almost all other countries). The primary exception is the German Civil Code of 1896 which is only slightly more detailed in its treatment of the subject. See generally B. S. MARKESINIS, A COMPARATIVE INTRODUCTION TO THE GERMAN LAW OF TORTS 18-24 (2d ed. 1990) (discussing German Civil Code in general and delict provisions in particular). For a discussion of comparative tort liability, see Franco Ferrari, *Comparative Remarks on Liability for One's Own Acts*, 15 LOY. L.A. INT'L & COMP. L.J. 813 (1993).

147. CODE CIVIL [C. CIV.] art. 1382-86 (Fr.).

148. *Id.* art. 1382 (Fr.).

149. *Id.* art. 1383. For a discussion of the requirement of fault and the French approach to duties of care, see LAWSON & MARKESINIS, *supra* note 124, at 94-99. Zwiegert and Kotz provide a concise explanation of the interpretation that has been given Articles 1382 and 1383:

The Code civil offers no definition of 'faute,' but writers have produced many different theories, most of which treat 'faute' as a failure to observe a precept of behaviour which the defendant should have respected. . . . Relying on art. 1383 Code civil it distinguishes between 'faute delictuelle' and 'faute quasi-delictuelle,' the former being characterized by the defendant's intention to cause the harm, while the latter is constituted 'by criticable conduct which a responsible person similarly circumstanced would not have committed.' Accordingly, so far as undeliberate harm is concerned, all systems agree in testing the behaviour of the defendant against that of the 'reasonable man of ordinary prudence' or the 'homme avisé' or the conduct of a person who exercises 'the care requisite in social intercourse.'

2 ZWIGERT & KOTZ, *supra* note 19, at 313 (citations omitted).

Because the delictual provisions of the Code Civil are so general in nature, the judiciary necessarily had to interpret them in order to apply them. This approach is generally inconsistent with the civil law approach in which the legislature reigns supreme and the judiciary is an administrative not law-making body. See MERRYMAN, *supra* note 123, at 39-47 (discussing limited role of judiciary in civil law countries generally); Sereni, *supra* note 143, at 161 (noting that civil code's broad

over-simplified, but the dedication to individualism is apparent in the commitment to fault.¹⁵⁰ Interpreted to create a form of comparative fault, these provisions represent the basis for French delictual law.¹⁵¹

1. *Treatment of Victim Fault*

At first blush, it does not appear that there is any room in the French Code for the concept of victim fault. Much like the common law in the nineteenth century, the Code reflects the economic influence of "a confident and enterprising middle class."¹⁵² In the face of the revolutionary spirit of individual freedom and responsibility, such a constituency unsurprisingly demanded an accounting of responsibility by those injured by the negligence or imprudence of others. That accounting came, not in the form of legislative enactment, as one would expect in a code driven state, but through judicial and scholarly interpretation of the existing Code provisions.

Because of the generality of the delictual provisions, there was some initial confusion as to how victim fault should be treated. Unlike the Romans who dealt with only specific situations requiring attention, the French had created a very general statement of responsibilities which had to be interpreted. Nevertheless, it appears it was never in doubt that victim fault would be considered in some way to affect recovery. Like the Romans, the French relied, at least in part, on the idea that causation links fault and damage, and that victim fault serves in some way to alter the causal connection.¹⁵³

and general statements give courts judicial discretion in implementing its terms). On the effect of the necessity of judicial interpretation of Articles 1382 and 1383, see generally LAWSON & MARKESINIS, *supra* note 124, at 43-45 (discussing need to identify policy factors which influence judicial decisions).

150. See generally 2 ZWIEGERT & KOTZ, *supra* note 18, at 342-43 (discussing basic commitment to fault "for the delineation of the spheres of rights within which individuals can develop their individuality.").

151. For a discussion of comparative fault under the French Code, see *infra* notes 152-56 and accompanying text.

152. VAN CAENEGEM, *supra* note 18, at 126.

153. ZWIEGERT & KOTZ, *supra* note 18, at 315. Zweigert and Kotz consider causation to fully explain treatment of victim fault as a means of reducing recovery. *Id.* Lawson and Markesinis conclude that "the rule of apportionment of liability on the basis of gravity of the respective faults has prevailed since the very early days of the Code of Napoleon even though the Code itself was silent on the question of fault of the victim." LAWSON & MARKESINIS, *supra* note 124, at 132-33. They disagree that causation tells the full tale on the reason victim fault is an issue and state, "the French judge-made rule had to find its true justification elsewhere and many have hence chosen to fall back on wider considerations of equity rather than on any particular operation of the doctrine of causation." *Id.* at 133.

Writing in the late nineteenth century, a major Code scholar, Marcel Planiol, discussed the role of causation:

To base responsibility solely on the idea of causality, would give rise to an almost unsolvable problem. The French jurisprudence, faithful to the theory of fault, is not apparently bothered by this difficulty. It suffices that fault be one of the causes of the damage, it being free to declare that there was a common fault in the case where several persons intervene, or that the victim himself committed a fault.¹⁵⁴

Causation thus took a backseat to the evaluation of fault and, as Planiol further indicated, the basis of apportioning responsibility was to be according to "the gravity of the faults committed respectively by the author and by the victim."¹⁵⁵

This approach to victim fault has evolved from a causation inquiry into an analysis of seriousness of the faults committed. However, there is no apparent basis for such an analysis other than the commitment to individual freedom inherent in the Code. Such an evaluation appears to parallel the common law development of victim fault in nineteenth century England and America.

Despite the parallel development of the Code and the common law, one distinction between the two is the fear of jury sympathy that pervaded the common law.¹⁵⁶ As such, the Civil Code treatment remains truer than the common law to the ideal of defining spheres of responsibility because a comparison of the seriousness of fault of the parties is not only possible but necessary to affect responsible conduct. Focusing on an "all-or-nothing" approach, whether based on causation or blame, does not have the same effect.

154. MARCEL PLANIOL, 2 TREATISE ON THE CIVIL LAW, pt. 1, No. 869, at 473-74 (Louisiana State Law Institute trans., 12th ed. 1959) (citations omitted). For a discussion of the difficulty of basing allocation of responsibility on causation, see *supra* notes 113-22 and accompanying text.

155. *Id.* No. 869C, at 476. In further discussion, Planiol admits the difficulty of comparing causation and appears to back off his dedication to comparing the gravity of the faults. Planiol finally concludes, however, that due to the extreme difficulty of measuring causality, it is easier to make the reparation proportional to the faults. *Id.* No. 899, at 502-03; see also LAWSON & MARKESINIS, *supra* note 124, at 133 (noting that justification for French judge-made rule based on wider considerations of equity, rather than any particular operation of doctrine of causation).

156. For a discussion of the effect of the jury system on the comparative fault rules, see *infra* notes 175-78 and accompanying text.

2. *Victim Fault and Strict Liability*

The French Code also contained provisions for what we would consider strict tort liability, even though these provisions were somewhat inconsistent with the individualistic heritage of the Code.¹⁵⁷ Article 1384 stated a rule of liability based on control, or *garde*, over a thing, or *fait de la chose*. "One is responsible not only for the damage which one causes by one's own act but also for the damage which is caused by the act of persons for whom one is answerable or of things which one has under one's control."¹⁵⁸ With the advent of the Industrial Revolution and its related accidents, the judicial mood toward the requirement of fault changed in some limited circumstances.¹⁵⁹ Article 1384 was consequently interpreted to impose a "presumption of responsibility" on the person in control over the offending "thing" which could not be rebutted by evidence of no fault.¹⁶⁰ The types of "things" to which this liability could attach included every corporeal object, without regard to the

157. 2 ZWEIGERT & KOTZ, *supra* note 18, at 353-54. See generally *id.* at 342-44 ("What happens in practice is that liability for fault imperceptibly shades into strict liability, and it is often a meaningless question whether a particular legal system, with regard to accidents of a particular type, adopts the principle of fault or of causal liability.").

158. C. civ. art. 1384, para. 1 (Fr.). Originally this article was presumed to require some fault in the choice of or supervision of other people and extended responsibility for the acts of others to the supervisor. ZWEIGERT & KOTZ, *supra* note 18, at 353. See also LAWSON & MARKESINIS, *supra* note 124, at 147 ("Yet for nearly a century these words were not, in fact, applied in their literal sense; and, indeed, the possibility of using them to establish a doctrine of strict liability seems never to have suggested itself for almost seventy years.").

159. LAWSON & MARKESINIS, *supra* note 124, at 142-43. The authors provide a thorough discussion of the movement toward non-fault based liability for these accidents based at least in part on the idea that the risk should be borne by the one in control of the instrumentality. *Id.* at 149-50. The parallel to *Rylands v. Fletcher*, 3 H.L. 330 (1868) is also made. *Id.* at 147; see also VON MEHREN & GORDLEY, *supra* note 123, at 600-05 (discussing difficulties in establishing fault in industrial accidents); 2 ZWEIGERT & KOTZ, *supra* note 18, at 354 (noting that French courts began to recognize liability for things under one's control as industrial accidents increased).

Article 1384 was at first interpreted to create a presumption of fault in the persons to whom it applied regarding responsibility for the acts of others. See PLANIOL, *supra* note 154, Nos. 906-13 (discussing responsibility for acts of another in general and for employees and minors specifically). The presumption also operated regarding responsibility for things under one's control. *Id.* Nos. 920, 931(2), 931(3). Planiol discussed the evolution of the idea of "a responsibility purely 'real'" taking place at the time and concluded that "it is incompatible with the existing texts of the Code." *Id.* No. 930. Planiol further explained that the conduct of the victim in this context, as in other circumstances, reduces recovery because the responsibility is shared. *Id.* No. 931(10).

160. *Jand'heur c. Les Galeries Belfortaises*, D.P. 1930, I. 57 (Cass. ch. reun., 13 fev. 1930). For a discussion of the *Jand'heur* decision, see LAWSON & MARKESINIS, *supra* note 124, at 150-51; ZWEIGERT & KOTZ, *supra* note 18, at 354-55.

dangerousness of the object.¹⁶¹

Victim fault was also considered relevant in these "strict responsibility" cases under Article 1384. Again, the justification was that if the victim's conduct was an unforeseeable event, external to the operation of the "thing," it would break the causal connection, as it would in a common law proximate cause analysis.¹⁶² The rule of comparative fault that accompanied the operation of Articles 1382 and 1383, however, caused some concern when applied to Article 1384, because the defendant was technically not at fault under Article 1384.¹⁶³ Nonetheless, victim conduct was considered on basically the same terms as it had been under Articles 1382 and 1383 by evaluating the causal connection and the relative degrees of "fault"—the defendant's in the failed presumed responsibility

161. ZWIEGERT & KOTZ, *supra* note 18, at 355-61 (discussing extent of strict liability and continuing requirement for fault in some circumstances). For a discussion of the application of this principle to manufacturers and sellers of products, see *infra* notes 165-74 and accompanying text. Automobile accidents thus became subjected in large measure to strict liability. See VON MEHREN & GORDLEY, *supra* note 123, at 612-14, 632-39 (discussing problem of automobile accidents and legislative intervention); see also LAWSON & MARKESINIS, *supra* note 124, at 151-60, 174-76 (discussing extent of strict liability for control of things and for automobile accidents in particular); ZIMMERMAN, *supra* note 125, at 1141-42 (comparing strict liability under Article 1384 to "a skyscraper constructed on the head of a pin").

162. LAWSON & MARKESINIS, *supra* note 124, at 150-51; ZWIEGERT & KOTZ, *supra* note 18, at 358-59. Lawson and Markesinis, in discussing the application of victim fault to these strict liability cases, state:

[T]he fact is that the courts have never wavered from the view that damages should be apportioned between the tortfeasor and the victim whenever both of them are at fault. And since the middle of the 1930s the same solution has been accepted in the context of article 1384 CC in cases where the victim's damage was partly due to his own fault and partly due to the non-negligent conduct of the tortfeasor/defendant . . . Given that in this case the conduct of one of the parties only (that of the victim) is related to fault, it becomes less easy to ascribe the reduction of damages to any idea of fault or deterrence and, instead, a "causal" explanation becomes more appropriate.

LAWSON & MARKESINIS, *supra* note 124, at 133.

163. VON MEHREN & GORDLEY, *supra* note 123, at 659. The courts then examined the conduct of the victim and the "conduct" of the thing to reduce the victim's recovery. *Id.*; see also ZWIEGERT & KOTZ, *supra* note 18, at 360-61 (discussing alternate views of whether liability under paragraph 1 of article 1384 is liability for fault).

In an attempt to be true to the strict nature of the liability, the Cour de Cassation in 1982 decided that, in the context of an automobile accident, the victim's conduct was irrelevant. See 2 ZWIEGERT & KOTZ, *supra* note 18, at 359. The full story of the *Desmares* case, which caused an uproar in the French courts, can be found in Andre Tunc, *It Is Wise Not To Take the Civil Codes Too Seriously*, in *ESSAYS IN MEMORY OF PROFESSOR F. H. LAWSON* 71, 79-83 (Peter Wallington & Robert M. Merkin eds., 1986). The Parliament overruled the decision with legislation in 1985. Law 85-677 of 5 July 1985. For a discussion of this legislation, see 2 ZWIEGERT & KOTZ, *supra* note 18, at 360.

under Article 1384 and the plaintiff's in the failed assumed responsibility.¹⁶⁴

3. *Victim Fault and Products Liability*

Although it would have been consistent to interpret Article 1384 to include liability of product manufacturers and sellers for the damages caused by the "things" they made and sold, and thus controlled at the time of manufacture and sale, products liability rules developed principally by extending contract rules.¹⁶⁵ Under Article 1641 of the Code, a seller is liable for hidden defects that make the thing sold unfit for its intended use or that so restrict its use that the buyer, had he known of the defect, would not have bought the thing or would have done so only for a lower price.¹⁶⁶ The seller is presumed to know of any such defect.¹⁶⁷

164. See LAWSON & MARKESINIS, *supra* note 124, at 133 (noting that under application of Article 1384 courts evaluated fault of both parties). On this subject, von Mehren and Gordley note the observations of the French scholar Mazeaud:

One can say that the courts limit themselves to an examination of the victim's fault and that, depending upon whether that fault is serious or slight, they hold the defendant liable for a small or a large part of the damage, even holding him not liable if victim's fault is very serious. But one can also emphasize that the examination of the victim's fault permits, by itself alone, an evaluation, at least in most cases, of the portion of the causation in the accident that rests on the victim and, in consequence, of that which rests on the defendant.

VON MEHREN & GORDLEY, *supra* note 123, at 659 (quoting 2 H., L. & J. MAZEAUD, *TRAITE THEORIQUE ET PRATIQUE DE LA RESPONSABILITE CIVILE*, No. 1075 (6th ed. 1970)).

165. This parallels the contractual heritage of our own products liability rules. See Bernstein, *supra* note 130, at 697-98.

166. C. CIV. art. 1641 (Fr.).

167. *Id.* Under article 1645 of the Code, the seller of defective goods must compensate the buyer for all harm due to the defect if he knew of the defect in the object sold. *Id.* art. 1645 (Fr.). Sellers are presumed to know of hidden defects and thus are responsible for all consequential damages. See GERAINT HOWELLS, *COMPARATIVE PRODUCT LIABILITY* 102-04 (1993) (examining judicial interpretation of hidden defects provision of French Code). Under article 1643, the seller is prevented from excluding this strict liability by any term he may put in the contract. The consumer is not barred from pursuing any remote sellers, like the manufacturer. This solution was apparently adopted by the courts based on the idea that the seller's obligation is attached to the product and not to the sale. See EUROPEAN PRODUCT LIABILITY 104 (Patrick Kelly & Rebecca Attree eds., 1992) ("A purchaser can bring an action founded on liability for latent defect, not only against the retailer that sold the product to him, but against any prior seller in the chain of supply, including the manufacturer."); HOWELLS, *supra*, at 105-08 (discussing liability of those high in the distribution chain and privity of contract); 2 ZWIEGERT & KOTZ, *supra* note 18, at 371 (discussing manufacturer liability). See generally Bernstein, *supra* note 130, at 697-99 (noting that French courts interpreted privity to allow consumers to sue manufacturers). This result clearly comports with the decisions in this country doing away with privity in both negligence and warranty actions. See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916).

Additionally, an important contractual obligation is the *obligation de securite*,¹⁶⁸ which arises through the contract of sale. This obligation gives rise to a responsibility "owed by businessmen to ensure the safety of those who use and consume their products."¹⁶⁹ While the obligation is not absolute, it requires, among other things, compliance with the state of the art, and providing information to product purchasers "so that the consumer may make use of the product for its intended purpose without any unpleasant side-effects."¹⁷⁰

Because of the strong commitment to the manufacturer's responsibility, based primarily on superior knowledge about the product's characteristics, the French determined that the knowing use of a defective product is the only victim conduct relevant to liability. A victim should not complain if injured by a defect about which she knew.¹⁷¹ While the French do not call this an assumption of the

(holding that manufacturer with knowledge of dangerous, negligently made product may be liable to third parties regardless of contract).

168. See HOWELLS, *supra* note 167, at 105-06 (defining *obligation de securite* as obligation owed by businesspersons to ensure safety of those who use and consume their products). The *obligation de securite* is in addition to the hidden defect liability and was adopted by the courts to enable injured persons, who could not take advantage of the hidden defect liability, to have a basis of liability on which to proceed. *Id.* at 106; see also EUROPEAN PRODUCT LIABILITY, *supra* note 167, at 103-04 (noting that if purchaser is mistaken as to use and benefit expected from product, seller is liable for misperception). The manufacturer is required to comply with the state of the art, to properly package the product, and to inform the purchaser of safe product use. HOWELLS, *supra* note 167, at 106.

169. HOWELLS, *supra* note 167, at 106.

170. *Id.* at 106 (citing J. Revel, *La Responsabilite Civile du Fabricant* (thesis, Paris, 1975)). For additional discussions of products liability in France, see Boger, *supra* note 19, at 7-10; see also Thomas Trumphy, *Consumer Protection and Product Liability: Europe and the EEC*, 11 N.C. J. INT'L L. & COM. REG. 321, 333, 341-42 (1986) (noting that under French civil law system retailers are responsible for all hidden defects, and manufacturers are strictly liable for product related injuries, although they are not in privity with consumers).

171. See HOWELLS, *supra* note 167, at 104 (stating that plaintiff cannot complain about defect of which he or she knew or should have known). According to Howells:

Whether a defect should have been discovered depends in the final analysis on all the circumstances, including the nature of the defect (such as how easily discoverable it was), the circumstances when the product was delivered and also the nature of the product. Clearly consumers should be on their guard for defects which are well known to be associated with certain products; for example, they should be more cautious when buying secondhand goods.

Id.

The type of inspection required is one which a purchaser in the same circumstances as the plaintiff would make. For example, if the plaintiff is a professional, a more stringent standard defines the type of inspection required. *Id.* at 104; EUROPEAN PRODUCT LIABILITY, *supra* note 167, at 107-08.

This standard appears similar to the assumption of risk analysis formerly used

risk defense, it closely parallels that defense in the way it operates.¹⁷²

Although there is some tort basis of liability for product injuries,¹⁷³ by far the most important liability is that based on contract. The tort liability based on Article 1384 is important because the European Community Directive adopts strict tort liability as the primary basis of liability, displacing contractual liability.¹⁷⁴ The victim fault rules under both bases of liability emphasize shared responsibility based on equality of knowledge, as well as causal principles that justify reduction in recovery.

D. ROLE OF THE JURY IN DETERMINING FAULT

As previously explained, one of the reasons American and English courts began to consider plaintiff fault as a limit on recovery was the perceived unfettered sympathy and discretion of the jury in determining liability.¹⁷⁵ This concern did not present itself to judges under the Civil Code because civil cases were not, and are

in this country regarding obvious defects — i.e., the product is not defective if it has a patently dangerous defect that injured the plaintiff and of which he or she should have been aware. For further discussion of manufacturers' tort liability for obviously dangerous products, see Patricia Marschall, *An Obvious Wrong Does Not Make a Right: Manufacturer's Liability for Patently Dangerous Products*, 48 N.Y.U. L. REV. 1065 (1973). The patent danger rule has been overturned by many jurisdictions because of the application of strict liability to defectively designed products. See *Pike v. Frank G. Hough Co.*, 467 P.2d 229, 236 (Cal. 1970) (extending strict liability to items defective in design because they lack safety devices); *Micallef v. Miehle Co.*, 348 N.E.2d 571, 573 (N.Y. 1976) (relaxing patent danger rule). But see *Bemis, Inc. v. Rubush*, 427 N.E.2d 1058, 1061 (Ind. 1981) (limiting manufacturers' liability for latent defects to those not open and obvious), *cert. denied*, 459 U.S. 825 (1982); *McCullum v. Grove Mfg. Co.*, 293 S.E.2d 632, 636 (N.C. Ct. App. 1982) (denying claim based upon lack of safety devices), *aff'd*, 300 S.E.2d 374 (N.C. 1983) (per curiam). Most often in this country, once the product is determined to be defective in design, the obviousness of the danger becomes relevant to the plaintiff's conduct.

172. See Boger, *supra* note 19, at 10 (stating that assumption of risk is absolute bar to recovery in suits against manufacturer). For a discussion of the proposed French product liability laws that will change the rules significantly, see *infra* notes 224-27 and accompanying text. For a discussion of assumption of the risk as the primary victim conduct appropriate to consider in determining recovery, see *infra* notes 224-26 and accompanying text.

173. For a discussion of Article 1384, see *supra* notes 157-64 and accompanying text. See generally EUROPEAN PRODUCT LIABILITY, *supra* note 167, at 110-11 (stating that bystanders are limited to tort liability); HOWELLS, *supra* note 167, at 108-09 (discussing French tort law and defective products).

174. For further discussion of the European Community Directive, see *infra* notes 179-217 and accompanying text.

175. For a discussion of the early treatment of contributory negligence, see *supra* notes 21-24 and accompanying text.

not, tried before a jury.¹⁷⁶ Just as the rules in this country evolved in response to the nature of the jury as decisionmaker, the substantive rules in civil law countries were influenced by the nature of the judge as decisionmaker. The Civil law influence may have merely reflected the knowledge that the judge does not exercise discretion, but simply applies the law. The rule-makers probably did not, and do not, concern themselves with the effect of the decisionmaker's sympathies on liability.

The difference in influence may be explained in part by the accountability of the judge in civil law countries as an employee of the system. In theory, judges do not make law, nor are they to rely on prior decisions to resolve controversies: they apply the statutes and find facts.¹⁷⁷ The legislature is the sole lawmaking body. As mentioned above, however, the Civil Code did not address many of the features of delictual liability. Consequently, judges necessarily were required to answer the issues presented to them. They did so, ostensibly, by interpreting the Code, most often by following prior interpretations that had met with approval by the final arbiter of statutory interpretation, the Court of Cassation.¹⁷⁸

A judge's decisions, although subject to influence by his or her personal predilections, are not likely to be affected by sympathy toward a victim. A juror, on the other hand, bears no accountability to the parties or the system for his or her errors, other than personal accountability and a sense of civic responsibility. As a result, the judicial decisions in civil law countries can be expected to be less subject to criticism by the public, less likely to meet with cries of "reform" and more consistent. One disadvantage, however, may be that judicial decisions in civil law countries are less likely to be the

176. See VON MEHREN & GORDLEY, *supra* note 123, at 99 (stating that jury is never used in French courts except for certain classes of criminal cases). Professor Merryman explains the different approach in civil law countries:

In the civil law nations, where there is no tradition of civil trial by jury, an entirely different approach has developed. There is no such thing as a trial in our sense; there is no single, concentrated event. The typical civil proceeding in a civil law country is actually a series of isolated meetings of and written communications between counsel and the judge, in which evidence is introduced, testimony is given, procedural motions and rulings are made, and so on.

MERRYMAN, *supra* note 123, at 112.

177. This description is necessarily general and is not intended to speak to the specific role of judges in every civil law country. See MERRYMAN, *supra* note 123, at 34-38 (discussing tradition and role of judiciary). Judges generally are considered civil servants, "a kind of expert clerk." *Id.* at 36.

178. See *id.* at 39-41 (describing French tribunal created to resolve interpretive problems); see also VON MEHREN & GORDLEY, *supra* note 123, at 97-108 (describing French judicial system in more detail).

catalyst for social change and less inclined to reach equitable conclusions.

V. THE EUROPEAN COMMUNITY'S APPROACH TO VICTIM FAULT

A. *The Products Liability Directive*

The European Community in 1985, in an attempt to harmonize the rules of products liability among its members, adopted Products Liability Directive No. 85/374.¹⁷⁹ The European Commission¹⁸⁰ adopted a rule of strict liability modeled in large measure

179. Council Directive 85/374 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1985 O.J. (L 210) 29 (1985) [hereinafter Directive 85/374]. The enactment of this Directive followed approximately fifteen years of discussion on the need for the European Community to take a position on centralizing products liability laws to prevent perceived unnecessary negative effects on competition within the Community. On the effect of a directive, Article 189 of the Treaty of Rome provides:

In order to carry out their task the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

Treaty of Rome, Mar. 25, 1957, art. 189, 298 U.N.T.S. 11, 78-79.

Much has been written on the history of the Directive and, principally, on the provisions of the Directive which enact strict products liability. *See generally* Bernstein, *supra* note 130, at 676-703 (noting causes and effects of EC members' failure to uniformly adopt directive); Boger, *supra* note 19, at 21-35 (providing analysis of Directive and effects of its adoption on existing national systems); Coe, *supra* note 19, at 205-14 (presenting overview of Directive's central features); The Right Honourable Lord Griffiths, et al., *Developments in English Product Liability: A Comparison with the American System*, 62 TUL. L. REV. 353, 362-69 (1988) (providing historical context for adoption of Directive and its subsequent effect); Lawrence C. Mann & Peter R. Rodrigues, *The European Directive on Products Liability: The Promise of Progress?*, 18 GA. J. INT'L & COMP. L. 391, 391-94 (1988) (summarizing EC Directive on products liability and related legislation pending in the Netherlands); Gregory G. Scott, *Product Liability in the European Community in 1992*, 18 WM. MITCHELL L. REV. 357, 359-71 (1992) (defining purpose and scope of Directive and clarifying obligations and responsibilities thereunder); Marshall S. Shapo, *Comparing Products Liability: Concepts in European and American Law*, 26 CORNELL INT'L L.J. 279 (1993) (providing comprehensive comparison of European and American product liability law); Trumpy, *supra* note 170, at 323-33 (analyzing Directive in context of concerns and protection provided to U.S. bar, consumer groups and corporations). For very detailed treatments of the Directive and European products liability, see EUROPEAN PRODUCT LIABILITY, *supra* note 167 and ANDREW GEDDES, PRODUCT AND SERVICE LIABILITY IN THE EEC: THE NEW STRICT LIABILITY REGIME (1992).

180. For a discussion of the organization of the European Community and the role of the European Commission, see *infra* notes 179-217 and accompanying text.

after the American rule.¹⁸¹ The main focus of the Directive was twofold: (1) to prevent the distortion of competition among member states that had attended the divergent national laws and (2) to provide increased consumer well-being and protection.¹⁸² The primary motivating factor seems to have been the latter. The Directive's preamble repeatedly refers to consumer well-being, and protection and safety, as well as placing primary responsibility on the producer because of his control over the product.¹⁸³

181. The Directive does not name strict liability as the theory of liability. Article 1 states simply: "The producer shall be liable for damage caused by a defect in his product." Directive 85/374, *supra* note 179, at art. 1. Professor Shapo has observed, "it is implicit in the simple requirement of Article 4 that the claimant must prove—but presumably need prove no more than—the damage, the defect and the causal relationship." Shapo, *supra* note 179, at 289-90. Further, the Preamble states: "Whereas liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production" Directive 85/374 *supra* note 179, at pmbl., para. 1. The preamble is identified by assigning paragraphs to its "whereas" clauses. For a full treatment of the contents of the Directive relating to liability, see articles listed *supra* note 179.

182. Directive 85/374 *supra* note 179, at pmbl., para. 1, 5. The Council also recently adopted a Directive on General Product Safety, Council Directive 92/59 1992 O.J. (L 228). This Directive establishes a framework for the standardization of product safety requirements and a special procedure to deal with product emergencies at the European Community level. It imposes a general obligation on manufacturers, distributors and importers to market only safe products. Safe products are those without an unacceptable risk to consumers. A set of rules and procedures will be established that manufacturers will have to follow from the time their goods are put on the market to the end of their foreseeable time of use. Manufacturers will be responsible for the permanent monitoring of their products. The Directive creates a Super Consumer Product Safety Commission as well. See *EC Commentaries, Consumer Policy* 12-13 (Coopers & Lybrand 1992). For a discussion of the Directive on General Product Safety, see Carl J. Pellegrini, Comment, *The European Economic Community's Council Directive Concerning General Product Safety*, 10 WIS. INT'L L.J. 400, 417-20 (1992) (reviewing details of 1988 Council Directive on product safety and possible benefits and drawbacks to U.S. suppliers).

183. See Directive 85/374 *supra* note 179, at pmbl., para. 4 (stating that consumer protection is responsibility of entire production process); *id.* at para. 5 (requiring full compensation); *id.* at para. 8 (noting producer liability unaffected by other causes); *id.* at para. 12 (allowing no contractual limitations on liability); *id.* at para. 13 (stating grounds of liability not exclusive; member states can supplement); *id.* at para. 17 (explaining that state of the art defense may unduly restrict consumer protection and is optional).

An earlier version of the Directive was more pro-consumer and pro-uniformity than the final version. Proposal for a Council Directive Relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1976 O.J. (C 241) 9; Amendments of the Proposal, 1979 O.J. (C 271); see also Bernstein, *supra* note 130, at 676-81 (discussing evolution of Directive and describing its law reform function).

Further evidence of the dedication to consumer safety may be found in the movement in the 1980s to adopt a Directive specifically dealing with consumer protection. The Commission adopted such a directive on June 29, 1992. Council Directive on General Product Safety, 92/59/EEC, 1992 O.J. (L 228). The general product safety Directive has as its goals the harmonization of disparate trade legis-

More importantly, the European definition of product defectiveness to which liability attaches, so troublesome in the United States, is based not on the producer's standards of design or manufacture, but on what the consumer is entitled to expect with regard to safety.¹⁸⁴ This standard recognizes the producer's superior knowledge and control over product quality and the concomitant responsibility for the aura of product safety that such knowledge and control creates. The treatment of victim fault should be read against this backdrop.

B. *The Directive's Victim Fault Provisions*

The Directive was written on a clean slate and thus does not attempt to reconcile the contractual and tort heritage of products liability in the member states. Nor does the Directive resolve any inconsistencies or complexities in the laws of the member states. Instead, the Directive sets the stage for harmony and leaves ample room for member states to retain the national character of their laws. Such is the case with Article 8, which deals with victim fault.

Article 8 contains two important and related conclusions about the sharing of responsibility. Section 1 imposes liability on the producer when the damage is caused both by a defect and the act or omission of a third party.¹⁸⁵ Section 2 concludes that such liability "may be reduced or disallowed when, having regard to all the cir-

lation and ensuring a high level of protection of health and safety. For a general discussion of the general product safety Directive, see Pellegrini, *supra* note 182.

184. Directive 85/374, *supra* note 179, at art. 6. This expectations test, so similar in tone to the consumer expectations test in section 402A, comments g and i of the Restatement, focuses not on the product's condition but on the safety that a person is entitled to expect, taking into account the following:

- (a) the presentation of the product;
- (b) the use to which it could reasonably be expected that the product would be put;
- (c) the time when the product was put into circulation.

Id.

A number of defenses are available to the producers, some controversial like the development risks defense, known as state of the art to Americans, and the government regulation compliance defense. *Id.* at art. 7. Such defenses make the Directive less consumer-friendly than it appears at first blush. A thorough discussion of these defenses is beyond the scope of this article. For a discussion of these and other defense matters, see Shapo, *supra* note 179, at 302-06.

185. Directive 85/374, *supra* note 179, at art. 8(1). This Article when read in conjunction with Article 5, which mandates joint and several liability, insures the plaintiff full recovery when more than one party is responsible. This result is foreshadowed by the preamble which states: "Whereas, in situations where several persons are liable for the same damage, the protection of the consumer requires that the injured person should be able to claim full compensation for the damage from any one of them." *Id.* at pmbl. para. 5.

cumstances, the damage is caused by a defect in the product and by the fault of the injured person or any person for whom the injured person is responsible.”¹⁸⁶ There seems to be both a causation basis for evaluating victim fault and a balancing of faults. Article 8 apparently did not cause any uproar in the deliberations of the European Commission or Council when the Directive was being debated. In the final analysis, Article 8 probably did not appear inconsistent, because most member states already considered victim fault in some way in evaluating liability.¹⁸⁷

Nevertheless, fault is not defined in Article 8. Only a few other references to victim fault in the Directive exist. The Preamble mentions that the contributory negligence of the consumer may be taken into account in determining recovery.¹⁸⁸ Notably, the victim fault provision is not included in Article 7, which describes the defenses available to producers.¹⁸⁹ The key to resolving the intended treatment of victim fault, according to Professor Marshall Shapo, is the Directive’s dedication to “fair apportionment of risk between the injured person and the producer.”¹⁹⁰ Linking the Directive’s concern for fair apportionment of risk with the consideration of dedication to consumer protection, the Directive’s victim fault provision appears only to require consideration of victim fault that represents recognition and acceptance of the risk from a product’s defective condition. This approach is consistent with the French treatment of victim fault.

C. *Victim Fault in the Member States After the Directive*

Because Article 8 provides that liability *may* be reduced by the fault of the injured person, the member states have the opportunity to determine for themselves the treatment to give victim fault. The

186. Directive 85/374, *supra* note 179, at art. 8(2).

187. For a discussion of the comparative fault provisions of other member states, see *infra* notes 192-217 and accompanying text; see also Shapo, *supra* note 179 at 317-18 (“This author surmises from private conversation that there were serious reservations among drafters and advisers concerning the wisdom of this provision. . . . [O]ne argument against any defense based on the plaintiff’s conduct was that such defenses would undercut the policies supporting the Directive’s fundamental theory of liability without fault.”).

188. Directive 85/374, *supra* note 179, at pmb., para. 8. Similar to Article 8, this paragraph begins with a discussion of causation. Such an organization might lead to a conclusion that the strict nature of the liability and the inherent difficulty of comparing faults, require an evaluation based on causation. See Bernstein, *supra* note 130, at 683 (“The Directive appears to endorse, but not quite require, plaintiff’s-conduct defenses.”).

189. Directive 85/374, *supra* note 179, at art. 7.

190. *Id.* at pmb., para. 1, 7; Shapo, *supra* note 179, at 319.

French legislature's treatment of this issue illustrates the recognition of the Directive's commitment to consumer protection.¹⁹¹ Treatment by selected other member states is also discussed.

1. *Victim Fault in France*

Prior to the adoption of the Directive, France had extremely pro-consumer product liability laws.¹⁹² It has been said that France's pro-consumer treatment of products liability has prompted the European Commission to begin preparation of a Directive on products liability.¹⁹³ Perhaps this is the reason that France, like many member states, has been reluctant to adopt the Directive,¹⁹⁴ and as of this writing still has not formally done so.

In reviewing the Directive, a committee was organized by the French National Assembly to determine how best to implement the Directive. The committee's work resulted in proposed legislation.¹⁹⁵ Not surprisingly, the proposal generally gave more protection to the consumer than required by the Directive.¹⁹⁶ The proposal explicitly adopts the Directive's liability without fault and does away with strict liability for the *garde* of the product under Article 1384¹⁹⁷ and under the contract provisions of Article 1641.¹⁹⁸

191. Member States were to adopt the Directive by 1988 but most did not. See EUROPEAN PRODUCT LIABILITY, *supra* note 167, at 11-12 (describing implementation of Directive as of 1991); Bernstein, *supra* note 130, at 675-76 (chronicling member states' adoption of Directive).

192. For a discussion of French product liability principles, see *supra* notes 165-74 and accompanying text. Additionally, for a discussion of whether pre-existing French law is more protective of consumers than the Directive, see HOWELLS, *supra* note 167, at 101.

193. J.A. Jolowicz, *Product Liability in the EEC*, in COMPARATIVE AND PRIVATE AND INTERNATIONAL LAW—ESSAYS IN HONOR OF JOHN HENRY MERRYMAN 377 (David S. Clark ed., 1990).

194. For a discussion of the status of adoption of the Directive, see *supra* note 191 and accompanying text.

195. The Law Committee of the National Assembly proposed revisions to the Code responsive to the Directive on June 20, 1991. EUROPEAN PRODUCT LIABILITY, *supra* note 167, at 103, 116; see also HOWELLS, *supra* note 167, at 114 (noting that Committee proposal amounted to overhaul of both product liability and general sales law); Alberto Ugona, *Liability and the EEC Directive—How Far Will it Go?*, REUTER TEXTLINE—RISK MANAGEMENT, Feb. 21, 1988. For a discussion of previous efforts to reform French consumer protection laws, see HOWELLS, *supra* note 167, at 110-14. For a general discussion of the history of the French attempt to conform to the Directive, see Patrick Thieffry et al., *Strict Product Liability in the EEC: Implementation, Practice and Impact on U.S. Manufacturers of Directive 85/374*, 25 TORT & INS. L.J. 65 (1989).

196. HOWELLS, *supra* note 167, at 115.

197. *Id.*

198. *Id.* at 101; EUROPEAN PRODUCT LIABILITY, *supra* note 167, at 119.

Nevertheless, liability will continue to be available based on fault.¹⁹⁹

Proposed Article 1386-11 describes defenses that prevent the imposition of liability.²⁰⁰ This Article incorporates Article 8 of the Directive on the effect of victim fault, but narrows its application. The choice to incorporate the language of Article 8 could lead to the conclusion that victim fault will be more available as a defense than it was previously because of the broad reference to "fault of the victim." The French proposal, however, more narrowly defines the relevant victim fault. The French proposal includes a provision stating that abnormal use by the victim, which could have been foreseen by the producer, does not constitute victim fault.²⁰¹ In most American jurisdictions, abnormal product use, even if foreseeable, will reduce but not bar a victim's recovery.²⁰² According to the French approach, foreseeable product misuse will not reduce recovery because the manufacturer could have anticipated it. This provision lends credence to the observation that victim fault is less available as a defense under the French proposal than under the Directive.

The French proposal, if adopted, will likely be interpreted much like the prior Code provisions, at least with regard to victim fault. Such an interpretation only takes into account victim fault based on knowledge of the defective nature of the product and conduct unreasonable in light of that knowledge. The French have combined the victim fault rules under the former contract-based and strict tort liability rules, concluding that the seller's responsibility for the safety of the consumer deserves a greater focus than the non-fault based strict liability provisions allow. Other pro-consumer

199. HOWELLS, *supra* note 167, at 101.

200. The state-of-the-art defense, called the development risks defense in Europe, is incorporated into the French Code in Article 1386-9. EUROPEAN PRODUCT LIABILITY, *supra* note 167, at 118. It has been said that French industry was persuasive in its efforts to have the development risks defense, not formerly known to French law, included. See HOWELLS, *supra* note 167, at 117 ("However French industry was able to persuade the government to include the defence, aided by the fact that during the delay leading up to the preparation of the new law, France's major trading partners had implemented the directive and had almost unanimously retained the defence.").

201. See EUROPEAN PRODUCT LIABILITY, *supra* note 167, at 118 (examining causes exonerating producers from liability). Other commentators read the French proposal even more narrowly to provide the only defense based on victim fault to be unforeseeable abnormal product use. For a more narrow approach to the French proposal, see HOWELLS, *supra* note 167, at 118.

202. For a discussion of the treatment of foreseeable abnormal product use in Illinois, see *supra* notes 47-48, 54-69 and accompanying text. For a discussion of the treatment of the same issue under the Ohio Code, see *supra* notes 51-52, 90-103 and accompanying text.

provisions in the proposal support the above conclusion and illustrate the philosophy behind the Directive in its French incarnation. Such provisions include: (1) the broader scope of damages to which the Directive will apply in France;²⁰³ (2) no limitation on the amount of damages recoverable;²⁰⁴ and (3) joint liability of sellers and producers.²⁰⁵

2. *Victim Fault in Other Member States*

Of the member states that have passed conforming laws,²⁰⁶ most have simply reiterated the language of Article 8 without any additional discussion. For example, Belgium, whose Civil Code provisions dealing with products liability have been interpreted in much the same way as the French Code,²⁰⁷ has enacted language that parallels Article 8 in its discretionary treatment of whether the fault of the victim will limit or prevent liability.²⁰⁸ The same is true in Denmark,²⁰⁹ the Netherlands²¹⁰ and Portugal.²¹¹

Germany takes a different approach. In Germany, the traditional approach to products liability is primarily tort-based and not contract-based.²¹² The German provisions implementing the Directive incorporate the contributory fault provisions of the German Civil Code.²¹³ Those provisions generally reduce a victim's recovery

203. See EUROPEAN PRODUCT LIABILITY, *supra* note 167, at 117 (discussing Article 1386-s).

204. *Id.*

205. *Id.* at 117-18 (discussing Article 1386-6).

206. The United Kingdom, Greece and Italy passed laws before the deadline. Luxembourg, Denmark, Portugal, Germany, the Netherlands and Belgium have since passed laws. France, Spain and Ireland are still delinquent. See Sandra N. Hurd & Frances E. Zollers, *European Community: Council Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products*, 32 INT'L LEGAL MATERIALS 1347, 1350 (1993) (discussing timing of member states' passage of laws); see also Bernstein, *supra* note 130, at 674-75 (detailing non-compliance by member states prior to imposed deadline).

207. Jolowicz, *supra* note 193, at 373 n.17.

208. See Hurd & Zollers, *supra* note 206, at 1360, art. 10 (translating Belgian Book of Statutes, Mar. 22, 1991).

209. *Id.* at 1366, para. 9 (Act No. 371, June 7, 1989).

210. *Id.* at 1396, art. 1407a (Law of 9/13/90, Statute book 1990, 523).

211. *Id.* at 1404, art. 7 (Law Decree No. 383/39 of Nov. 6, 1989).

212. See HOWELLS, *supra* note 167, at 123 (explaining that attempts to mold contractual principles rejected in favor of tort approach to products liability); EUROPEAN PRODUCT LIABILITY, *supra* note 167, at 125, 138 (examining German approach to product liability in tort and contract). See generally, B.S. MARKESINIS, *THE GERMAN LAW OF TORTS* (1986) (providing comprehensive treatment of German products liability law).

213. Hurd & Zollers, *supra* note 206, at 1372, sect. 6 (Law of Dec. 15, 1989). For a general description of German products liability laws, see EUROPEAN PROD-

based on the degree to which he or she has contributed to causing the damage.²¹⁴ Similar causation-based provisions are found in Greece²¹⁵ and Luxembourg.²¹⁶ Italy is the only country that bars recovery for assumption of the risk, when the injured person proceeded to use a product despite knowledge of its defect or danger.²¹⁷

The Directive may seem ambivalent at first regarding whether and how to consider victim fault in determining the extent of products liability. Nevertheless, the strong commitment to consumer protection is apparent. Most civil law countries in Europe, particularly France, place less emphasis on victim fault than American jurisdictions. The difference in emphasis is reflected in the European view that victim fault is often not considered as a defense, but rather as a means of adjusting plaintiff's recovery, almost as a matter of damages assessment, based on causation principles. While causation may not be the appropriate means of comparing individual and institutional responsibility, the European approach, illustrated by the French treatment, indicates a willingness to consider the context in which the victim acts.

VI. A PROPOSAL FOR THE TREATMENT OF VICTIM FAULT IN PRODUCTS LIABILITY

A. American and European Treatment Compared

Partly as a result of the emphasis on individualism and self-reliance in our society, American jurisdictions are overly willing to consider individual victim fault in limiting institutional liability for product failure. Several reasons exist for the differences in the American and European treatment: Philosophical differences about responsibility, differences in the identity of the decisionmaker and differences in culture that cannot be quantified. The Europeans, however, share our commitment to individualism and equality, even if the history from which those ideals arose is different. Another important similarity provides the basis for a use-

UCT LIABILITY, *supra* note 167, at 125-67; HOWELLS, *supra* note 167, at 123-46 and Joachim Zekoll, *The German Products Liability Act*, 37 AM. J. COMP. L. 809 (1989).

214. EUROPEAN PRODUCT LIABILITY, *supra* note 167, at 154.

215. Hurd & Zollers, *supra* note 206, at 1379, art. 8(2) (Protocol No. B. 7535/1077, Mar. 31, 1988).

216. *Id.* at 1392, art. 5 (Bill of Mar. 9, 1989).

217. *Id.* at 1387, art. 10 (Decree No. 224, May 24, 1988). For a discussion of products liability in Italy, see Guido Alpa, *Manufacturer, Importer and Supplier Liability in Italy Before and After the Implementation of the E.E.C. Directive on Damages for Defective Products*, 6/7 TUL. CIV. L.F. 233, 234-36 (1991-92).

ful comparison: The normative foundation of civil liability in fault compared with the consequent obligation of a seller who represents product safety and quality to reliant, less knowledgeable consumers. While both systems are grounded in fault, the Europeans have recognized that to assess fault in the context of a product relationship, the differences between the knowledgeable institution and the uninformed individual must be acknowledged.

Strict products liability is essentially fault-based when it comes to design and warning defects which are the sources of the most serious allegations of victim fault.²¹⁸ While the decision to move to a strict liability system may have come at different times in Europe and America, both systems share the same goals: promoting consumer safety, better quality products and a more equitable risk distribution. These foundational similarities make the difference in treatment of victim fault surprising. Nevertheless, unlike the Americans, the Europeans focus on the institution as having a greater responsibility to individual product consumers. This dedication may be found in the Directive's clear favoritism of the consumer's interests over the interests of the institutional members of the marketplace.²¹⁹

Most American jurisdictions recognize the inconsistency of allowing a victim-fault defense to a strict liability action but not allowing plaintiff fault as a defense in non-product, strict liability actions.²²⁰ American jurisdictions have grappled with this inconsistency in strict products liability in spite of the obvious parallels to

218. For a discussion of the nature of strict products liability as fault-based in design defects, see Davis *supra* note 2, at 1238-40. On the nature of strict products liability as fault-based in warning defects, see Henderson & Twerski, *supra* note 2, at 273-78.

219. For a discussion of the Directive's focus on consumer safety, see *supra* notes 182-83 and accompanying text. The same is seen in the French treatment of the obligation of institutions regarding hidden defects. For a discussion of such French treatment, see *supra* notes 166-67 and accompanying text.

220. For a discussion of victim fault in ultra-hazardous activity actions, see *supra* note 26 and accompanying text, see also PROSSER & KEETON ON TORTS, *supra* note 7, § 79, at 565, which explains that plaintiff's contributory negligence is no defense in a strict liability action. While secondary assumption of the risk, which has a fault-like component, is recognized as a defense in strict liability actions based on abnormally dangerous activities or animals, that defense is based in large part on the idea of consent to the defendant's conduct. PROSSER & KEETON ON TORTS, *supra* note 7, § 79, at 565-66. The Reporters of Restatement (Second) of Torts § 402A, advocated the application of plaintiff fault in strict products liability actions in a way similar to its application in other strict liability actions. As a result, § 402A includes assumption of risk as a defense. RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965). For the text of comment n, see *supra* note 38. For a discussion of jurisdictions that follow this approach, see *supra* notes 51, 52 and 90-103 and accompanying text.

other types of strict liability, where the reasons behind the no-fault basis of liability are similar.²²¹ This symmetry problem would not exist if American jurisdictions recognized, as the European jurisdictions seem to, that when a substantial number of people may unknowingly use a defective product in a harmful way, no justification exists for removing liability from the institution that created or marketed the defective product, simply because one individual user of the product acted imprudently. The product remains defective and still has the potential to injure others, even prudent users.

One justification for the American approach is that the comparative fault rules supposedly deter careless plaintiff conduct. This justification, however, fails to recognize that individuals are careless for an infinite variety of reasons, many of which are not subject to any particular influence, much less a liability rule.²²² A rule that requires an otherwise responsible, or at-fault,²²³ manufacturer to compensate fully only the careful victims is ineffective in deterring irresponsible behavior. Such a rule fails to emphasize the trusting nature of the relationship the manufacturer shares with *all* consumers, not just the careless, and the manufacturer's responsibility arising from this relationship.

Recognition of the disparity in knowledge and responsibility between the individual consumer and the institutional producer seems to be the linchpin of the French treatment. Under the such an approach, only defenses based primarily on the victim's knowl-

221. For a discussion of victim fault in non-products strict liability, see *supra* notes 26-27 and accompanying text. Additionally, for a description of comparative fault principles as inconsistent with the goals of strict liability, see Sobelsohn, *supra* note 21, at 440-41.

222. For a discussion of the proposition that consumer behavior is not likely to be influenced by comparative fault principles, see Sobelsohn, *supra* note 21, at 440.

223. According to the Restatement, strict products liability is technically non-fault based. See RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965). Products liability is really fault-based in that it requires a balancing of the risks and the benefits of the product as designed, or as warned. See generally Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 600 (1980) (noting that design defect liability is negligence based); Davis, *supra* note 2, at 1230-48 (discussing predominantly fault-based analysis required in most jurisdictions for determining design defects and advocating highest degree of care in analysis); Henderson & Twerski, *supra* note 2, at 271-73 (discussing essentially negligence-based evaluation of warning defects); Alan Schwartz, *Proposals for Product Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 369 (1988) (noting that manufacturing defects are only ones to which strict liability truly attaches). Further, Professor George Priest forcefully argues that the Reporters for the Restatement (Second) of Torts § 402A did not intend to include in that section design and warning defects in the scope of strict products liability. George L. Priest, *Restatement Section 402A: The Original Intent*, 10 CARDOZO L. REV. 2301 (1989).

edge of the specific defect are permitted.²²⁴ The French proposal to implement the European Products Liability Directive incorporates what I call a responsible treatment of victim fault. The French only consider victim conduct that indicates knowledge of a specific product defect and continued product use despite that knowledge.²²⁵ Further, under the French proposal, foreseeable abnormal product use does not reduce recovery, presumably because the victim and the institution do not share the same quality of knowledge about the defect.²²⁶

The French approach recognizes the importance of the producer's obligation under the representations of quality and safety which attach in the marketing of products. The French define the producer's responsibility in terms of the product's effect on the level of safety that every consumer has a right to expect.²²⁷ Only when the victim knows of a product defect and acknowledges the danger, does the victim actually have no expectation of product safety. In this situation the victim is truly responsible, or "at fault," for his own injuries. No other victim conduct should be relevant.

While the European Community Directive allows for the possibility of considering victim fault in determining liability, its dedication to this principle is ambivalent at best. This ambivalence, coupled with the Directive's clear emphasis on consumer protection, indicates a great concern for victim protection from institutions involved with product manufacturing and marketing.²²⁸ Concern about the perceived excesses of the American strict liability system failed to stem the desire of the drafters of the Directive to enact greater consumer protections.

B. *American Tort Reform's Failure of Responsibility*

The scope of the tort reform movement in the last two decades has been staggering.²²⁹ During this time, desire to expand or con-

224. For a discussion of the French treatment of victim conduct, see *supra* notes 170-71 and accompanying text.

225. For a discussion of the French proposal to implement the European Products Liability Directive, see *supra* notes 195-205 and accompanying text.

226. For a discussion of the French treatment of foreseeable abnormal product use, see *supra* note 201 and accompanying text.

227. For further discussion of the French approach, see *supra* notes 165-72 and accompanying text.

228. For treatment of the Directive's focus on consumer safety, see *supra* notes 182-83 and accompanying text.

229. For a discussion of the efforts at reform of products liability in particular, see 1 ALI REPORTERS' STUDY, *supra* note 1, at 3-52. For a criticism of recent tort reforms for their lack of individualistic treatment, see Kenneth S. Abraham, *What is a Tort Claim? An Interpretation of Contemporary Tort Reform*, 51 MD. L. REV. 172, 180-

tract liability has fluctuated. The only discernible reason for either view is the constant ebb and flow of attitudes toward liability, which are typical of any society.²³⁰ Moreover, the scope and speed of change varies immensely between periods.²³¹ For example, significant changes over the last thirty years have not encouraged an acceptance of responsibility by institutions that produce and distribute products. Increasing liability does not increase responsibility. Only rules which emphasize the importance of the consumer to the product relationship will increase respect for responsibility.²³² Recent tort reform efforts have failed in this respect.

The American Law Institute, currently writing the Restatement (Third) of Torts on products liability,²³³ should consider the history of the European treatment of victim fault and the fundamental policy of consumer protection and safety that supports the recent European move toward more consumer-friendly rules.²³⁴ Unfortunately, the ALI Reporters' first draft effort is decidedly not pro-responsibility. Preliminary Draft No. 1²³⁵ includes a section entitled

85 (1992). For a response to Professor Abraham's argument, see Marc Feldman, *The Intellectual Ordering of Contemporary Tort Law*, 51 MD. L. REV. 980 (1992).

230. For a discussion of the interplay of legal traditions and social factors that contribute to the evolution of legal principles, see VAN CAENEGEM, *supra* note 18, at 180-87. A particularly appropriate quote on this point is: "[W]hatever the means of change in the law, innovation is usually the result of collective pressure of interests or ideas, and the efforts of groups in society aiming at emancipation or power." *Id.* at 182. Professor van Caenegem continues:

To emphasize the role of social movements and conflicts of powers and interests is not to misunderstand the influence of ideas, which are themselves historical facts. Even the best and the most just of ideas, however, can assert itself only when social forces are disposed to adopt it. Without the political will, legal principle has little prospect of success.

Id. at 183.

231. For a discussion of the changes in tort law over the past six decades as a function of changing judicial philosophy, see J. Clark Kelso, *Sixty Years of Torts: Lessons for the Future*, 29 TORT & INS. L.J. 1 (1993).

232. For a suggestion that product manufacturers should be held to the highest degree of responsibility in design defect litigation because of the relationship of trust with the consumer, see Davis, *supra* note 2, at 1267-81.

233. For a discussion of the reform of section 402A being undertaken by the ALI, see *Symposium: The Revision of Section 402A of the Restatement (Second) of Torts: Occasion for Reform of Product Liability Law?*, 10 TOURO L. REV. 1-237 (1993). For a discussion of the recent ALI Reporters' study on tort reform and enterprise responsibility that prompted the effort to rewrite section 402A, see *Tort Reform Symposium: Perspectives on the American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury*, 30 SAN DIEGO L. REV. 213-404 (1993).

234. For further discussion of the European Products Liability Directive, see *supra* notes 180-90 and accompanying text.

235. RESTATEMENT (THIRD) OF TORTS (Preliminary Draft No. 1 April 20, 1993) [hereinafter Preliminary Draft No. 1]. A Preliminary Draft is "in every sense, preliminary. It represents the work, synthesis, and approach of its authors, and is exclusively the work of the Reporters. It is truly preliminary in that it represents

"Comparative Responsibility as a Defense" and provides the broadest possible scope of victim conduct as a limit on recovery.²³⁶ Belying its title, there is no focus on responsibility. The word "responsibility" is used here, as it is often used, to emphasize the victim's inattentive and mistaken conduct. Such conduct is engaged in every day by millions of product users. There is no corresponding reference to responsibility in the title of the Preliminary Draft's section defining liability for the institutional defendants.

Subsequently, the Reporters completed a Tentative Draft which was reported to the ALI in May, 1994.²³⁷ The Reporters included victim fault defenses in a section entitled "Affirmative Defenses" and stated the general rule that "plaintiff's conduct [that] fails to conform to an applicable standard of care" will reduce plaintiff's recovery.²³⁸ This inclusion of all conceivable types of plaintiff conduct further broadened the language of the Preliminary Draft by referring to "applicable standards of care," rather than to "standards of reasonable care." Such an approach implies that it is possible to reduce a plaintiff's recovery for conduct that may be reasonable, yet substandard in some way. This conclusion is supported by comment d of the Tentative Draft, which includes plaintiff conduct such as failure to discover a defect, and open and

the first of many stages of an eventual Restatement." M. Stuart Madden, *The Preliminary Draft of a Proposed Restatement (Third) of Torts: Products Liability*, 15 J. PROD. & TOXICS LIAB. 163, 163 (1993). Professor Madden quotes the ALI's Executive Director, Professor Geoffrey C. Hazard, Jr., of Yale Law School, as describing the Preliminary Draft as "a moving target." *Id.* at 163 n.1. The Reporters have since prepared a Council Draft for submission to the ALI's Council.

236. Preliminary Draft No. 1 § 106 states:

When the conduct of the plaintiff combines with a product defect to cause harm to the plaintiff's person or property and the plaintiff's conduct fails to conform to applicable standards of reasonable care, the plaintiff's conduct shall be compared with the product defect pursuant to the applicable general rules of comparative responsibility.

Preliminary Draft No. 1, *supra* note 235, at 171. This section includes plaintiff conduct generally not considered relevant in products liability actions, such as the failure to discover the defect or the failure to guard against an obvious defect. Most jurisdictions do not recognize defenses based on such conduct and the Restatement (Second) of Torts § 402A certainly did not. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965). For a criticism of Preliminary Draft § 106 as overbroad and unfair, see Howard A. Latin, *The Preliminary Draft of a Proposed Restatement (Third) of Torts: Products Liability—Letter*, 15 J. PROD. & TOXICS LIAB. 169, 178-82 (1993).

237. AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY, TENTATIVE DRAFT NO. 1 (April 12, 1994) [hereinafter TENTATIVE DRAFT NO. 1]. For a discussion of the substance of the ALI meeting on this draft, see *ALI Hesitates on Lawyer Liability, Product Liability Restatement Efforts*, 62 U.S.L.W. 2734 (May 31, 1994).

238. TENTATIVE DRAFT NO. 1, *supra* note 237, § 7, at 143-44.

obvious defects resulting from lack of needed safety features.²³⁹ Such forms of plaintiff conduct have routinely been ignored because of the consumer's right to a defect free product, which can be used in the intended manner without inspection. The Reporters expressed distaste for the categories of plaintiff conduct used in so many jurisdictions, instead combining all plaintiff conduct into one category — substandard conduct.²⁴⁰ The problem with this approach is that it magnifies the importance of plaintiff's conduct by defining it extremely broadly, thus diminishing the institution's responsibility for the defective product in the first place.

The comments to the Tentative Draft are enlightening in the wide scope of the defense the Reporters envision. For example, comment a, discussing the rationale for the section, states that it would be unfair to impose the costs of substandard plaintiff conduct on manufacturers, because they would then be forced to pass those costs onto careful plaintiffs.²⁴¹ How this is unfair to manufacturers, who will not be accepting responsibility for the defective products and who will not be paying for the losses, is unclear. Further, if the hapless consumer bears the costs under the Tentative Draft's approach, then manufacturers have no incentive to make safer products. The Reporters indicate that such behavior by manufacturers would be a merely speculative result and therefore insignificant as a disincentive to make safer products.²⁴² Of course, the product is defective no matter who it injures. If the manufacturers need only compensate those injured during careful use, the losses resulting from the defective condition will never be fully considered in evaluating the investment in safety needed.

Likewise, many jurisdictions that have considered tort reforms in the past decade have failed to encourage responsible conduct by institutional actors. The results of reforms in Illinois, Colorado, Ohio and Texas provide perfect examples. These jurisdictions have broadened the scope of relevant victim fault without also assessing the responsibility of the institutions involved.²⁴³ Such treatment may reflect the impact of strict products liability in expanding liability generally, as well as the perceived need to expand available defenses. Unfortunately, both movements have missed the point. While the history of strict products liability in this country in the

239. *Id.* § 7 cmt. d.

240. *Id.*

241. *Id.* § 7 cmt. a.

242. *Id.*

243. For a discussion of the approaches taken by these jurisdictions, see *supra* notes 48-112 and accompanying text.

1960s and early 1970s was decidedly pro-consumer, its focus has not been pro-responsibility. The only exception has been the tangential notion that the institution in the best position to anticipate, and thus accommodate a risk, should bear that risk.²⁴⁴ A return to a more balanced method of defining responsibility as a focus for liability may put greater faith in the American system.

C. *Comparing Responsibility to Relationships*

1. *The Nature of the Comparison*

Victim fault, more properly characterized as victim responsibility, should be considered in assessing recovery. A meaningful comparison of responsibility must clearly identify the persons to whom the parties' responsibility is owed, in effect personalizing the responsibility. Once the responsibility is personalized, its breach can be placed in context—thus giving rise to a conclusion of fault. By considering the relationship that gives rise to the responsibility, a determination can be made as to whether an individual or an institution, was “at fault.” Otherwise, any comparison of responsibility will be out of context and, thus, will be unsatisfactory for accomplishing any of the goals related to the imposition of liability.²⁴⁵ The non-contextual evaluation of fault in products liability is a problem that will persist until the relationships to which responsibility attaches are emphasized.

Institutions involved in the production and marketing of products are responsible, of course, to “the general public.” That phrase, however, implies a faceless and nameless anonymous mass, unidentified and unpersonalized. Any meaningful comparison of responsibilities between institutions and individuals must emphasize both the magnitude of the institutional responsibility and the specific responsibility to the individual victim. Both the magnitude and the personalization of the responsibility get lost in our current

244. A recent shift has occurred in which products liability case results have been favorable to the defendants. See Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992) [hereinafter Eisenberg & Henderson, *Quiet Revolution*]; James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990) [hereinafter Henderson & Eisenberg, *Empirical Study*]; see also James A. Henderson, Jr., *Why the Recent Shift in Tort?*, 26 GA. L. REV. 777 (1992) (responding to Professor Schwartz' reasons for general shift in tort law); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 683-99 (1992) (cataloging reasons for contraction of “post modern” tort law).

245. For a discussion of the goals of the tort liability system, and products liability in particular, see *supra* notes 8-17 and accompanying text.

comparative fault systems.²⁴⁶

Similarly, individuals, do not owe responsibility to themselves alone. Perhaps this is the first failing of contributory negligence as a defense: It assumed that the plaintiff's conduct should be judged by what a reasonable person would do to protect himself.²⁴⁷ The rugged individualism instilled in Americans, and our Roman and European forebears,²⁴⁸ has led to the current dissatisfaction with our system of enforcing responsibility.²⁴⁹

2. *The Moral Foundations of Comparing Victim Fault*

In his recent work on defining the moral foundations of products liability, Professor David Owen tackles this vast subject.²⁵⁰ He identifies the basic moral imperatives that inform the imposition of liability as freedom and community, with the emphasis on freedom.²⁵¹ His ordering of moral values is based on the moral superiority of freedom over community²⁵² and provides one example of the staying power and strength of the ideal of individualism. Working from his premise is useful to the thesis of this Article even though it may be debatable whether freedom is so clearly the dominant moral value.²⁵³

246. In discussing his fault-line approach to comparative fault in products liability cases, Professor Sobelsohn comments on the need to keep the defendant's fault in issue:

If, in apportioning liability, one cannot take account of the defendant's fault, one must ignore the dangerousness of the defendant's product. But surely the manufacturer of a product whose dangers far outweigh its benefits deserves more blame—and should suffer more liability—than should the maker of a product for which the balance comes closer to equivalence. Indeed, the exclusive focus on plaintiff's conduct may produce perverse results: as the danger posed by a product increases, the same conduct with regard to that product becomes more and more unreasonable. But unless jurors consider the fault of the manufacturer, they will allocate larger shares of the fault to plaintiff's injured by more dangerous products, thus assuring that manufacturers of the most dangerous products will pay proportionately the least in damages.

Sobelsohn, *supra* note 21, at 430-31 (footnotes omitted).

247. For a discussion on the history of contributory negligence in America, see *supra* notes 21-27 and accompanying text.

248. For a discussion of the impact of individualism on legal rules, see *supra* notes 146-51 and accompanying text.

249. For a discussion of responsibility and the need to reevaluate our definitions of what it means to be responsible, see Bender, *supra* note 5, at 895-908.

250. See Owen, *Moral Foundations*, *supra* note 8, at 437 (refuting "the moral plausibility of a general principle of strict liability as inappropriate to cases of accidental harm").

251. *Id.* at 498. Professor Owen does an admirable job of defining first principles of products liability.

252. *Id.* at 438-49.

253. See *id.* at 453-59 (discussing concept of community).

For purposes of defining liability rules, the freedom of conduct is certainly of central importance; freedom to choose one's own conduct provides the only legitimate basis for holding the actor responsible. The freedom to choose implies a level of knowledge about the choices available.²⁵⁴ As a result, the responsibility for choices should be measured by the reasonableness of the choice, given the knowledge upon which it was based and the persons that will be affected. The only victim conduct relevant to liability, then, is conduct based on specific knowledge of a product's dangers and defects.

Some might question why constructive knowledge of a defect is not enough to allow consideration of victim fault. Manufacturers have control over product quality and, therefore, have specific knowledge of product conditions. Moreover, manufacturers may be presumed to know of defective product conditions because of their control over the production process and the availability of detailed technical information. Consumers have no such knowledge and are incapable of acquiring it. A consumer may use a product for years and never have more than general knowledge about the product's condition and its capabilities. Consumers are inherently at a disadvantage in gaining the knowledge necessary to enable them to make real choices.

Even if the use of a product indicates a possible problematic condition, such use does not equate to knowledge of a possibly defective condition. In fact, any knowledge gained would be based on pure speculation. Under such a theory, a reasonable person in the plaintiff's position "should have known" of a defective condition that ultimately showed itself, even though it would be virtually impossible for the consumer to have more than a passing hint of the defective condition. For example, driving a car with the temperature light warning of an overheated engine condition could indicate one of several dangerous conditions to the driver, none of which could equate to a defective condition—low water level, leak-

254. See *id.* at 439-41 (discussing knowledge of truth as necessary for effective selection and pursuit of goals). Professor Owen explains the importance of truth, and thus knowledge, to responsibility:

A person's ability to control his life, to live effectively within the world, is highly dependent upon the extent to which that person's vision of the world is true. Without possessing the truth in substantial measure, humans frequently would suffer accidental harm. Thus, truth is an extremely important resource that persons must seek and often share to protect the autonomy of themselves and other persons threatened with accidental harm.

Id. at 441. For further discussion of the idea of sharing and its importance to the community ideal, see *id.* at 457-59.

ing hoses, broken water pump. However, the possibility of a defective condition also exists—that a hose is defective or that there is an electrical problem causing the light to malfunction. If the driver continues to drive the car, and the car ultimately proves to have a defective condition which caused the overheated condition, a jury could reasonably conclude that the driver should have known that there was a possible defective condition and should have stopped driving. Such constructive knowledge would thus lead to a finding of victim fault based on generalities and possibilities. The manufacturer's fault, on the other hand, is based on specific knowledge of the vehicle's defect. Such a result allows the inequality of knowledge and control to benefit the manufacturer. The speculative nature of constructive knowledge, the inequality of the character of consumer knowledge compared to a manufacturer's knowledge, and the aura of product quality that automatically attaches to products mitigate against any consideration of constructive knowledge as a measure of victim fault in defect cases. The institution-individual relationship begins with unequal knowledge. Consequently, the only way to compare conduct fairly is to require an equality of that knowledge in fact.

3. *Comparison Based on Knowledge of Defect*

Considering only victim conduct based on specific knowledge of defect effectively equalizes the comparison of the institution's and the individual's conduct to that based on knowledge of the product's condition. This is effectively the approach taken by jurisdictions like Ohio that only consider assumption of a specific, known risk to reduce plaintiff's recovery.²⁵⁵ This is also the approach taken by the French and the one supported by the philosophy behind the European Community ideal of product responsibility.

This approach recognizes that freedom to choose does not take place in a vacuum, but in the context of relationships within our communities. Respect for relationships and the equality of the parties to those relationships is often undervalued as a building block in the foundation of liability rules.²⁵⁶ A relationship, between individuals or institutions, necessarily defines the responsibility owed by the parties. As individual members of relationships with

255. For a discussion of Ohio's approach in considering victim fault in strict liability cases, see *supra* notes 90-103 and accompanying text.

256. For a discussion of how the sharing notion fails to provide meaningful norms of responsibility, see Owen, *Moral Foundations*, *supra* note 8, at 458.

family members and friends, employers and employees, we owe a responsibility to conduct ourselves in a way that respects those relationships, especially if we are serving as providers and nurturers. We also owe a responsibility to ourselves.

The only product use, therefore, which disregards respect for an individual's relationships, and which can be compared with the institution's responsibility regarding the product, is use that reflects knowledge of a threat to an individual and her relationships resulting from a danger in the product. Simply stated, the institution that made that product has as its first and foremost responsibility the well-being of users and consumers of the product. An institution will always have greater knowledge regarding the product's characteristics, certainly regarding design and manufacturing defects. Consequently, the institution will have greater knowledge regarding the potential ways in which the product might pose a threat of which the user is not aware, nor capable of becoming aware. Once an individual user or consumer becomes aware of a dangerous defect, the institution and individual have an equality of knowledge and their conduct regarding it can be compared.

The victim fault described, essentially secondary assumption of the risk, should reduce but not bar recovery because the institution still has manufactured, distributed or sold a defective product. The requisite victim knowledge must be of the specific defect and its dangers.²⁵⁷ Foreseeable product misuse that does not include knowledge of a product defect should not be considered in comparing fault,²⁵⁸ unless it, for some other reason, evidences an irresponsible disrespect for the relationships of which plaintiff is a member. Such disrespect may be demonstrated by grossly negligent, reckless or wanton conduct. Absent such plaintiff conduct, the institution will have failed its responsibility completely. The plaintiff will have failed, if at all, by an imprudent use of the product—one that would not have led to injury absent the defect in the product.

In a products liability action in which the manufacturer has allegedly marketed a defective product, the defendant has a respon-

257. It does not escape the author that this proposal is much like that recommended in comment n to section 402A of the Restatement. For the text of comment n, see *supra* note 38. The main difference is that comment n would totally bar recovery for assumption of the risk and this author would not. For a discussion of comment n and section 402A, see *supra* notes 38 and 220 and accompanying text.

258. This is essentially the rule in France. For discussion on this rule, see *supra* notes 165-72 and accompanying text.

sibility to all potential victims. This responsibility is inappropriately de-emphasized when the focus shifts from the product's defect to a particular plaintiff's conduct unrelated to the product defect. If a plaintiff misuses a product in a way that does not reflect knowledge of a defect, such misuse may be careless, even foolish. It should not, however, be compared with the manufacturer's failed responsibility because the manufacturer's responsibility is *to* the plaintiff (as well as thousands of other consumers) specifically *about* the product. The plaintiff owes a responsibility to exercise care to his or her family, possibly to an employer or employees, even to friends. On the other hand, the plaintiff owes no responsibility to the manufacturer, certainly not *about* the defective condition of the product, unless, of course, he or she knows about the condition of the product.

To prevent this de-emphasis on institutional responsibility, institutions should not be allowed to escape responsibility for product failures unless the plaintiff's conduct is unreasonable in relation to a known product defect.²⁵⁹ Only then are the bases of responsibility being compared in equilibrium—the superior knowledge of the institution is balanced with the specific knowledge of the plaintiff as to that defect. Requiring plaintiff's specific knowledge of the defect and danger before plaintiff conduct is in issue, as in Ohio and some other jurisdictions,²⁶⁰ provides a symmetry of analysis between

259. An excellent example of this phenomenon is *Andren v. White-Rodgers Co.*, 465 N.W.2d 102 (Minn. Ct. App. 1991). In *Andren*, plaintiff lit a cigarette while leaving a basement filled with propane gas from a leaking heater. *Id.* at 104. Plaintiff knew the basement was filled with propane gas and believed the pilot light had gone out. *Id.* He tried to air out the basement by opening the windows, and was on his way to get a screwdriver to loosen some of the windows when he lit a cigarette. *Id.* He was severely burned. *Id.* In his action against the maker of the regulator, which he claimed was defective, the court granted summary judgment for the manufacturer on the basis that Andren assumed the risk of injury and thereby relieved the manufacturer of its duty to manufacture and design non-defective products. *Id.* at 107. In a monument to confusion, the court's opinion concludes that the plaintiff primarily assumed the risk, i.e. consented to the manufacturer's failure, and thus was barred from recovery. *Id.* at 106. The court's rationale lies in its belief that Andren was in a better position to protect himself than the manufacturer, even though Andren only knew that there had been a leak and had no knowledge of the defective nature of the regulator. *Id.*

260. See *Tafoya v. Sears, Roebuck & Co.*, 884 F.2d 1330, 1341 (10th Cir. 1989) (applying Colorado law, whereby actual knowledge of specific danger required for assumption of risk defense where plaintiff was injured by rotating blades after falling from riding lawnmower); *McMurray v. Deere & Co.*, 858 F.2d 1436, 1440 (10th Cir. 1988) (applying Oklahoma law, whereby tractor manufacturer's assertion of assumption of risk defense not valid absent proof that plaintiff was aware of danger of defect); *Moore v. Sitzmark Corp.*, 555 N.E.2d 1305, 1309 (Ind. Ct. App. 1990) (holding that skier who released manufacturer for ski binding's possible failure to disengage from skis did not assume risk of design defect that caused the possible

the basis of liability and the basis of defense.

VII. CONCLUSION

It has been said, "Each age has the law it deserves."²⁶¹ This article seeks to address the law this "age" deserves in the area of responsibilities and obligations for product-related injuries. This country is perceived to have recently experienced an age of selfishness and excess and entered an age of introspection about goals dealing with responsibility and accountability. Products liability actions increasingly are returning to a fault-based, fairness-seeking approach that is less focused on risk-distribution.²⁶² We are now in the period of assessing where we have been, where we are and whether we are where we want to be. This Article has proposed a method of assessing responsibility in products liability actions that is responsive to our search for the proper balance of responsibilities.

Each institution and individual involved in a products liability action should expect to have his or her conduct measured in relation to his or her relationships and the attendant responsibility. The general way in which most jurisdictions "compare fault" or "compare responsibility" is inadequate because the jury is simply allowed to identify "faults," without considering the identity of the parties, their conduct or attendant responsibilities. Percentages of responsibility can probably never be assigned with certainty. Nevertheless, the method used to assess relevant conduct can and should be certain. Simply calling a scheme one of comparative responsibility does not suffice.

Individuals in our society are expected to live up to strict rules of responsibility as compared to the less stringent rules imposed on the anonymous producers and marketers of products. Intuitively, it

failures); *Wild v. Consolidated Aluminum Corp.*, 752 S.W.2d 335, 336 (Mo. Ct. App. 1988) (holding that specific knowledge of precise danger in defect is required for contributory fault instruction in products liability case).

261. VAN CAENEGEM, *supra* note 18, at 26. I was both intrigued and inspired by this statement. It seemed to say too much while not saying enough about society and a legal system's ability to reflect all of society's components. It is probably truer that each age has the law that those in power think they deserve and that will profit them the most. This somewhat cynical view is aired here only to emphasize that this quote served merely as the starting point for my journey into this study of how our legal system harshly treats the foibles of victims as compared with those of victimizers.

262. For a discussion on the trend in products liability of results increasingly favorable to defendants, see Eisenberg & Henderson, *Quiet Revolution*, *supra* note 244, at 522-30; Henderson & Eisenberg, *Empirical Study*, *supra* note 244, at 772-84; and Schwartz, *supra* note 224, at 384-92.

is easier for a jury to evaluate and, therefore, criticize the victim's conduct than to remain focused on the technical nature of a product's failed design or manufacture. As a procedural matter, plaintiff's counsel must keep the jury focused on the defendant's failed responsibility. As a normative matter, it is the jurist and legislator who must keep the applicable legal principles focused on the need for balance between the responsibilities owed by institutional defendants to the consuming public and the responsibilities individuals owe to their relationships and themselves.

There is nothing sacred about the way the American comparative fault system operates. Most observers would say it is overly complicated and unstable because of the inherent inability to apportion fault, cause, and/or damages arising out of one isolated event. Tort reform, however, has been associated with reducing liability, not by reemphasizing responsibility, but by, among other things, restricting the types of victims who can recover. The focus on responsibility in the European Community and the civil rules that support it illustrates a way to measure victim conduct that is more responsive to issues of responsibility. True tort reform should emphasize the acceptance of responsibility, not the avoidance of it.